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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,

Cross-Petitioner,

v.

AMERICAN TARGET ADVERTISING, INC.,

Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether requiring professional fund raising consultants to obtain a $25,000 bond or letter of credit when registering in Utah violates the First Amendment.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS

The decision of the United States Court of Appeals for the Tenth Circuit sought to be reviewed is reported at 199 F.3d 1241 (10th Cir. 2000) (reproduced in the Appendix, App. 1). The judgment of the United States District Court for the District of Utah reviewed by the court of appeals is reported at 23 F.Supp.2d 1303 (D. Utah 1998) (App. 29).

STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit Court of Appeals sought to be reviewed was entered on January 13, 2000. This Court has jurisdiction to review on a writ of certiorari the judgment of the United States Court of Appeals under 28 U.S.C. § 1254(1).

This petition is a conditional cross-petition, and as such, can only be granted if the Court grants the Petition for a Writ of Certiorari filed by American Target Advertising, Inc, No. 99-1647. S.Ct. R. 13.4. In filing this conditional cross-petition, the cross-petitioner, Francine A. Giani, relies on S.Ct. R. 12.5, which provides for filing within 30 days after a case has been placed on the docket. The Petition for a Writ of Certiorari was placed on the docket on April 13, 2000.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The constitutional provisions, statutes, and regulations that are relevant to a determination of this case are set forth below.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdietion the equal protection of the laws.

The Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 to -21 (Supp. 1998), is set out in the Appendix, App. 51-83.

Rule R152-22-6, Utah Code of Judicial Administration, is set out in the Appendix, App. 85-86.

STATEMENT OF THE CASE

Procedural Background

Pursuant to 28 U.S.C. 1331, American Target Advertising, Inc. filed an action in the United States District Court for the District of Utah against Francine A. Giani in her official capacity as Director of the Utah Division of Consumer

Protection ("Division"). App. 2; CA10 App. 2.[1] American Target sought damages under 42 U.S.C. § 1983, various injunctive relief, and a judgment from the district court under 28 U.S.C. § 2201 declaring the Utah Charitable Solicitations Act unconstitutional. App. 2; CA10 App. 2. After the parties filed cross-motions for summary judgment, the district court granted the Director's motion and the action was dismissed. App. 3, 50.

American Target timely appealed the judgment of the district court to the Tenth Circuit. App. 2-3. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, the court of appeals affirmed the judgment in part and denied the judgment in part. App. 3. The court rejected American Target's claims that the Act violates the Due Process Clause and Commerce Clause of the United States Constitution. App. 22-27. The court held that three provisions of the Act, including a bonding requirement, violate the First Amendment. App. 9-12, 19-20. American Target timely filed a petition for writ of certiorari, Case No. 99-1647, and now the Director files this conditional cross-petition.

Fundraising by American Target

American Target is a Virginia corporation that provides fundraising services to various nonprofit organizations, including Judicial Watch, Inc, a "political watchdog" organization based in Washington, D.C. App. 3, 32. Judicial Watch retained the services of American Target to "build a

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[1]Matters found in the Appendix filed in the Tenth Circuit are cited as "CA10 App." followed by the appendix page number.

national base of supporters across the country." CA10 App. 397-98.

Directing Fundraising. Under its agreement with Judicial Watch, American Target is generally responsible for all direct mail packages seeking financial contributions. CA10 App. 16. American Target prepares the creative copy and design of mailings. CA10 App. 16-17. American Target acts as Judicial Watch's disclosed agent in acquiring production services relevant to direct mail solicitations, including the ordering of services and materials from vendors and suppliers. CA10 App. 16-17. Judicial Watch relies on American Target to select lists for potential donors and identify dates when mailings should occur. CA10 App. 16-17. American Target also consults and advises Judicial Watch regarding its solicitations and other communications to the public. CA10 App. 16-17. Moreover, American Target is Judicial Watch's exclusive list broker for all solicitations performed under the agreement. CA10 App. 16-17.

Fees. American Target receives 8¢ for each direct mail solicitation in Utah and any other state and 7¢ for each newsletter or thank you letter. CA10 App. 19. American Target also receives $1.00 for every person that participates in a monthly giving program established by the parties up to $5,000.00 per month. CA10 App. 19. American Target receives 10¢ for each name rented by Judicial Watch from the "Agency Masterfile" other than those names developed under the agreement. CA10 App. 21. However, Judicial Watch is responsible for costs and expenses only to the extent sufficient contributions are received to cover those bills. CA10 App. 27.

Disbursement of Contributions. Payment for American Target's services is directly tied to contributions. CA10 App. 27. Contributions are not sent directly to Judicial Watch. Instead, contributors send donations to an escrow account administered by an agent and pursuant to an agreement approved by both American Target and Judicial Watch. CA10 App. 17. The escrow agent disburses funds, first, to American Target for cost advances, and second, to vendors and suppliers, including American Target, for the costs associated with the mailings. CA10 App. 17-18. A portion of what is left is held in reserve for future costs. CA10 App. 17-18. Only then, after the payment of advances, costs, and fees, and the reservation of money for future costs, are any remaining funds disbursed to Judicial Watch. CA10 App. 17-18.

The Bond Requirement

The Utah Charitable Solicitations Act requires registration of professional fundraisers and consultants (collectively referred to as "fundraising professionals") who provide fundraising services in connection with solicitations in Utah . Utah Code Ann. § 13-22-5 (Supp. 1998). In addition to the payment of a registration fee and the submission of an application that includes various disclosures, the fundraising professional must submit proof that it has obtained a bond or letter of credit of at least $25,000. Utah Code Ann. § 13-22-9 (Supp. 1998). The bond or letter of credit must be "payable to the state for the benefit of parties who may be damaged by any violation of th[e] [Act]." Utah Code Ann. § 13-22-9(4)(b).

Among the interests sought to be advanced by the State under the Act is the protection of Utah residents (and charities who solicit in the State) from harmful or injurious acts, including fraud, by those who participate in the charitable solicitation process, including fundraising professionals. *See* Utah Code Ann. § 13-1-1 (1999); Utah Code Ann. §§ 13-22-1 to -21; CA10 App. 186.

Registration Status

During the 1997 fiscal year, ninety fundraising professionals registered with the State. CA10 App. 187. Although Judicial Watch is registered with the State as a charity that solicits contributions from Utah residents, American Target has not registered as either a professional fundraiser or consultant. App. 3, 33. Accordingly, American Target may not solicit contributions from Utah residents on behalf of Judicial Watch until and unless American Target registers with the Division. App. 3; Utah Code Ann. § 13-22-6(1)(b)(xiv)(B) (Supp. 1998).

ARGUMENT

REASONS FOR GRANTING THE CROSS-PETITION

This petition seeks conditional review of the court's decision declaring the bond requirement unconstitutional. The Director asserts that in striking Utah's bond requirement, the court of appeals disregarded this Court's holding in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 792 (1988), that "[t]he interest in protecting charities (and

the public) from fraud is . . . a sufficiently substantial interest to justify a narrowly tailored regulation." The court also improperly focused on the impact of the bond on a commercial enterprise, rather than its impact on speech. Moreover, the decision of the Tenth Circuit conflicts with a decision of the United States Court of Appeals for the Sixth Circuit, the only other circuit to specifically address the bond issue.

Although the Director ultimately decided not to seek independent review of this part of the decision, she brings this cross-petition so that in the event American Target's petition is granted, the Court may fairly review all relevant issues presented in this case.[2]

I. The Tenth Circuit Decided an Important Federal Question in a Way That Conflicts with Controlling First Amendment Analysis.

This Court may choose to grant a petition where the circuit court of appeals decided an important federal question in a way that conflicts with relevant decisions of the Court. S.Ct. R. 10(c). In striking the bond requirement, the court of appeals (1) ignored the State's legitimate interest for requiring a bond and applied the wrong test in determining whether the requirement was narrowly tailored, and (2) incorrectly reviewed Utah's Act based on the business interests of a fundraising professional rather than the speech interests of its client.

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[2]The Director, however, does not seek review of the Tenth Circuit's holding that sections 13-22-9(1)(b)(xiv) and 13-22-12(1)(b)(vii) violate the First Amendment. *See* App. 19-20.

A. The Tenth Circuit's Narrow View of the State's Interest in Protecting the Public and Charities from Fraud Is Not Justified Under Supreme Court Precedent.

The court of appeals correctly found that the Utah Charitable Solicitations Act "targets the secondary effects of professional solicitations, i.e., increased fraud and misrepresentation[,]" and that it "does not authorize a content-based review of the charitable mailings." App. 5. As such, the court correctly concluded that the Act is subject to intermediate scrutiny, requiring the Director to demonstrate that it "(1) serves a substantial governmental interest and (2) is 'narrowly drawn' to serve that interest 'without unnecessarily interfering with First Amendment freedoms.'" App. 5-6 (*quoting Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 636-37 (1980)).

However, in striking the bond requirement, the court of appeals disregarded the test this Court uses to determine whether or not a regulation is narrowly tailored: Does the regulation "'promote[ ] a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (*quoting United States v. Albertini*, 472 U.S. 675, 689 (1985)). Clearly, absent the bond, the State's interest in protecting both the public and charities will be achieved less effectively.

Although the court recognized that Utah's interest "'in protecting charities (and the public) from fraud is . . . a sufficiently substantial interest to justify a narrowly tailored

regulation,'" App. 6 (*quoting Riley*, 487 U.S. at 792), it dismissed out of hand Utah's contention that the bond requirement served that interest. App. 10. In this vein, the court incorrectly held that the bond requirement "supports a different state interest than the other challenged provisions of the Act," which permit "prophylactic oversight of professional fundraisers." App. 10. The court of appeals mistakes "protection" for "prevention." In so doing, the court unjustifiably and erroneously narrowed the State's legitimate and substantial interest in protecting the public and charities from fraud.

While Utah's interest in protecting charities and the public from fraud is no doubt served by regulatory measures to *prevent* fraud, it is also served by measures that assist victims of fraud, including charities, in recouping contributions misappropriated by fundraising professionals.[3] The word "protect" not only means to "keep from harm, attack, or injury," but it also means "to assure payment of . . . by reserving funds." Webster's II New Riverside University Dictionary 946 (1988). For this very reason, home owners and car owners purchase insurance to protect them from loss. This Court has recognized that the government's interest in protecting the public extends beyond preventive measures. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 854 (1996) (observing that the purpose of the federal regulatory reserve requirements for banks "was to

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[3]The decision also ignores the preventive impact of requiring a bond. A bond will act as a deterrent to fraudulent or other unlawful acts—if the bond is called because of misdeeds by the fundraiser, the fundraiser will likely then be obligated to repay the insurer or bank. App. 40-41.

protect depositors and the deposit insurance fund"); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990) (observing that "Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) includes a mandatory Government insurance program that protects private-sector workers participating in covered pension plans against the termination of their plans before sufficient funds have been accumulated to pay anticipated benefits").

Protecting a business's customers or clients from loss by requiring bonds or other sources of insurance is not novel. For example, the Utah Health Spa Services Protection Act requires that a health spa obtain a bond, letter of credit, or certificate of credit of up to $75,000 before doing business. Utah Code Ann. § 13-23-5(3). Likewise, the Utah Telephone Fraud Prevention Act requires telephone solicitors to post a $50,000 bond, letter of credit, or certificate of deposit before doing business in Utah. Utah Code Ann. § 13-26-3(3) (1998 Supp). Like the Charitable Solicitations Act, both statutes are enforced by the Division of Consumer Protection and fall under title 13 of the Utah Code which was expressly enacted "to protect [the public] from harmful and injurious acts." Utah Code Ann. § 13-1-1.

Thus, protection not only denotes prevention, but also mitigation from harm. In striking the bond requirement, the court of appeals simply concludes that the State's "interest is adequately served by the preventive measures within the Act." App. 10-11. However, those who fall victim to fraud will find little solace in any regulatory measure designed to prevent fraud. In today's national and global economy, solicitations often originate hundreds if not thousands of miles away,

making it difficult, and often impractical, for victims to seek redress through a civil tort action as suggested by the court of appeals. *See* App. 10. The bond requirement enables even donors an avenue of redress. *See* Utah Admin. Code R152-22-6 (1997). In short, the bond requirement "promotes a substantial government interest that would be achieved less effectively" without it. *Ward*, 491 U.S. at 799.

This Court "ha[s] been loathe to second-guess the Government's judgment" regarding the regulation needed to serve an important or substantial state interest. *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989). Yet, in disregarding the State's interest in assuring an avenue for recouping misappropriated moneys, the court of appeals did just that.

B. The Tenth Circuit Erroneously Focused on the Business Interests of the Fundraising Professional Rather than the Free Speech Interests of the Speaker.

In invalidating the bond requirement, the Tenth Circuit observed that American Target introduced evidence demonstrating that it was required to pledge 100 percent collateral to obtain the bond, and that because it could not do so, it would be required to borrow the full amount. App. 11. The court concluded that as a result, the bond requirement "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom." App. 11. That conclusion, however, misses the mark, mistaking the fundraising professional with the speaker.

The free speech rights of American Target, a for-profit corporation, are not at issue in this case. American Target has claimed that the Charitable Solicitations Act abridges its clients' free speech rights. American Target is a professional fund raising consultant who manages and directs fundraising campaigns on behalf of clients like Judicial Watch. American Target's inability to compete for business in this arena does not implicate the First Amendment. The issue, therefore, is not whether the bond requirement imposes a burden on the ability of a for-profit fundraiser to compete as the court of appeals apparently believed. Rather, the appropriate inquiry under the First Amendment is whether the bond requirement imposes a sizeable burden upon the speaker's ability to speak.

In the first ten months of its contract with Judicial Watch, American Target raised approximately $700,000 in contributions. CA10 App. 168-69. Yet, only $60,000 to $70,000 was disbursed to Judicial Watch, or a mere 10% of total contributions. CA10 App. 169. That return is lower than what many states have found to be the norm. As observed in the Brief of Amici Curiae, Mike Hatch, Minnesota Attorney General, *et al.* ("States' Amici") filed in the Tenth Circuit, California found that less than 37 cents of every dollar raised by fundraisers went to the charitable organization; Illinois found that approximately 26 cents of every dollar went to the charity; Washington found that just over 40 cents of every dollar went to the charity; and New York found that less than 25 cents of every dollar went to the charity. States' Amici, pp. 7-8.[4]

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[4]The States' Amici cited the following sources: Office of Attorney General, California, *Attorney General's Report on Charitable Solicitations*

As observed by one author, "[f]und-raising has become big business in the United States as Americans exercise their traditional approach to solving problems, advancing causes, and sustaining programs and institutions by private initiative and voluntary organization." Bruce R. Hopkins, *Charity Under Siege: Government Regulation of Fund Raising* 13 (1980) (citing *Giving USA*, 1980 Report of American Association of Fund-Raising Counsel). If American Target cannot compete with others in this rapidly growing and competitive industry, clients like Judicial Watch and others may turn to those that can so compete. The First Amendment does not guarantee the viability of fundraising professionals, only the unfettered speech of those who wish to speak.

While at least 90 fundraising professionals are able to secure a bond or letter of credit in Utah, *see* CA10 App. 187, for reasons not apparent from the record, American Target has not. Yet the evidence indicated that where a business relationship already exists between a bank and an organization seeking a letter of credit, collateral is not necessarily required. CA10 App. 325. Only where no existing business relationship existed would the bank require 100 percent collateral. CA10 325. The bank may also require collateral if the organization was new and did not have well-established financial statements.

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by Commercial Fundraisers (December 1997) at 1; Office of Attorney General, Illinois, *Professional Fund-raising Report* (July 1997), Table A at 12; Table B at 14; Office of Attorney General and Office of Secretary of State, Washington, *How Much for Charity? How Much for Profit and Expenses?* (November 1997) at 1; Office of Attorney General, New York, *Pennies for Charity* (October 1998) at ii (only covering results from campaigns conducted by telemarketers).

CA10 App. 325-26. Collateral would also be required if the organization had bad credit. CA10 App. 326. Otherwise, the only cost to an organization is a nominal setup fee and an annual maintenance fee ranging from one to two percent of the face amount of the letter of credit ($250 to $500). CA10 App. 225. Even when collateral is required, however, it typically could be in the form of any number of assets, including "real estate, accounts receivable, inventory, stocks and bonds[,] or cash." CA10 App. 326. American Target's failure to compete in no way hampers Judicial Watch or other organizations from retaining fundraising professionals who can compete in this ever growing market.

II. The Tenth Circuit's Decision Is in Conflict with the Decision of the Sixth Circuit.

The Tenth Circuit's decision is also in conflict with the Sixth Circuit decision in *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474 (6th Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996). That case was before the Sixth Circuit on an interlocutory appeal of the district court's preliminary injunction, enjoining enforcement of selected provisions of Ohio's charitable solicitations law. 70 F.3d at 1477-78.

In *Dayton Area*, the Sixth Circuit expressly recognized with approval that Ohio's $25,000 "bonding requirement imposed upon professional solicitors also attempts to deter fraud and provide a fund from which to compensate charities for monies lost or misappropriated by the professional solicitors." 70 F.3d at 1486. Given that interest, the court concluded that the

appellant's challenge to the provision would not likely succeed on the merits. *See id.* at 1480-81. Accordingly, the court determined that the district court acted within its discretion in concluding that the bonding requirement was narrowly tailored to serve a legitimate state interest. *Id.*

Unlike the Sixth Circuit, the Tenth Circuit rejected the State's interest in providing a means from which fraud victims can recoup losses and it failed to recognize the deterrent effect of such a fund.[5]

The holding is also in conflict with the decision of a federal district court in the Eighth Circuit. In *Heritage Publishing Co. v. Fishman*, 634 F.Supp. 1489, 1502 (D. Minn. 1986), the district court noted that Minnesota required a $20,000 bond not of the charity, but of the professional fundraiser. Recognizing the states' well-established authority to "require a bond as a part of regulating a business," the district court concluded that the bond requirement was "narrowly drawn to serve the state interests of preventing fraud and preserving public funds." *Id.*

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[5]The Tenth Circuit rejected the holding in *Dayton Area* due to the difference in the procedural posture of the two cases and hence, the applicable standard of review. The Tenth Circuit observed that while the Sixth Circuit had reviewed the preliminary injunction for an abuse of discretion, the Tenth Circuit was reviewing the Utah federal district court's judgment as a matter of law. App. 10. This difference, however, carries little significance inasmuch as the Sixth Circuit retained the authority to reverse the district court's decision if it "improperly applied the governing law, or used an erroneous legal standard." *Dayton Area*, 70 F.3d at 1480 (internal quotes and citations omitted). The pronouncement in *Dayton Area*, therefore, establishes the Sixth Circuit's posture regarding the legitimacy of bonding requirements.

Given the inconsistency between the circuits, this Court should therefore grant the Director's petition to resolve any further conflict and inconsistency. *See* S.Ct. R. 10(a) (stating that the Court may grant a petition where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

CONCLUSION

For the reasons stated above, the Director respectfully requests the Court to grant this Petition if it grants American Target's Petition for Writ of Certiorari.

Respectfully submitted this 15nd day of May, 2000,

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APPENDIX

AMERICAN TARGET ADVERTISING, INC., a Virginia corporation, Plaintiff - Appellant,

v.

FRANCINE A. GIANI, in her official capacity as Division Director of the Utah Division of Consumer Protection, Department of Commerce for the State of Utah, Defendant - Appellee.

BRUCE W. EBERLE & ASSOCIATES, INC.; FREE SPEECH DEFENSE AND EDUCATION FUND, INC., MIKE HATCH, MINNESOTA ATTORNEY GENERAL, ET AL., Amici Curiae.

No. 98-4158.

United States Court of Appeals, Tenth Circuit.

January 13, 2000

Mark J. Fitzgibbons, American Target Advertising, Inc., Manassas, Virginia (Gifford W. Price, Mackey, Price & Williams, Salt Lake City, Utah, with him on the briefs), appearing for Appellant.

Jeffrey S. Gray, Assistant Attorney General, Salt Lake City, Utah, appearing for Appellee.

F. Hayden Codding, Codding & Codding, Fairfax Virginia, filed an amicus curiae brief on behalf of Bruce W. Eberle & Associates, Inc.

William J. Olson, John S. Miles, Alan Woll, and John F. Callender, William J. Olson, P.C., McLean, Virginia; Mark B. Weinberg, Weinberg & Jacobs, LLP, Rockville, Maryland; Michael J. Norton, Norton-Lindstone, LLC, Englewood, Colorado; and Herbert W. Titus, Troy A. Titus, P.C., Virginia Beach, Virginia, filed an amicus curiae brief on behalf of the Free Speech Defense and Education Fund, Inc.

Mike Hatch, Attorney General, and Roberta J. Cordano, Assistant Attorney General, State of Minnesota, St. Paul, Minnesota, filed an amicus curiae brief on behalf of Mike Hatch, Minnesota Attorney General, et al.

Before TACHA, HOLLOWAY, and BALDOCK, Circuit Judges.

TACHA, Circuit Judge.

American Target filed this suit against Francine A. Giani in her official capacity as Director of the Utah Division of Consumer Protection. American Target sought declaratory, injunctive, and other relief, asking the district court to hold the Utah Charitable Solicitations Act unconstitutional. On cross motions for summary judgment, the district court granted summary judgment in favor of defendant. American Target filed a timely

appeal, and we exercise jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part.

I. Background

American Target is a Virginia corporation that provides fundraising services to nonprofit organizations. The corporation is under contract to provide such services to Judicial Watch, Inc., a nonprofit organization located in Washington, D.C. Under this contract, American Target helps manage Judicial Watch's national direct mail campaign.

By virtue of its contract with Judicial Watch, American Target is classified as a professional fundraising consultant under the Utah Charitable Solicitations Act. Utah Code Ann. § 13-22-2(11) (Supp. 1999). The Act requires all professional fundraising consultants to register with the state and obtain a permit. Id. §§ 13-22-5, -9. To obtain the required permit, American Target must complete a written application, pay an annual fee of $250 and post a bond or letter of credit in the amount of $25,000. Id. § 13-22-9.

American Target has not complied with the registration requirements and is therefore barred from assisting Judicial Watch with its mailing in Utah. American Target claims that the Act violates several provisions of the U.S. Constitution, including the First Amendment, the Commerce Clause and the Due Process

Clause of the Fourteenth Amendment. We address each constitutional challenge.

II. First Amendment

The First Amendment provides that government "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. In a facial challenge, American Target argues that the Utah Act operates both as an impermissible abridgement of protected speech and as an unconstitutional prior restraint. Because nothing in the record indicates that the Act will have any different impact upon interests not before this court, we analyze both prongs of the First Amendment challenge as they are presented under the facts of this case. City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 801-02 (1984). If any provision should fail as applied to American Target, we will then decide if the provision is unconstitutional on its face. To find a provision facially unconstitutional, we must conclude that "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." Id. at 797.

A. Protected Speech

We review de novo challenges to the constitutionality of a statute. United States v. Hampshire, 95 F.3d 999, 1001 (10th Cir. 1996). In addition, where expressive activity is arguably protected by the First Amendment, this court must make an independent examination of the entire record. Bose Corp. v. Consumers Union of United

States, Inc., 466 U.S. 485, 499 (1984). After such review, we conclude that all but three of the challenged provisions are consistent with the First Amendment.

Charitable solicitations qualify as protected speech for First Amendment purposes. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980). Content neutral regulation of protected speech is subject to "an intermediate level of scrutiny." Turner Broad. Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622, 642 (1994). The "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). A measure designed not to "suppress the expression of unpopular views" but rather to control the "secondary" effects of speech will generally be deemed content neutral. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986).

The Utah Act targets the secondary effects of professional solicitations, i.e., increased fraud and misrepresentation. The Act does not authorize a content-based review of the charitable mailings. It simply facilitates oversight of the mailers' backgrounds and methods. Therefore, the Act is content neutral, and we accordingly subject it to intermediate scrutiny. The state must demonstrate that the Act (1) serves a substantial governmental interest and (2) is "narrowly drawn" to serve that interest "without unnecessarily interfering with

First Amendment freedoms." Village of Schaumburg, 444 U.S. at 636-37.[1]

"The interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." Riley v. National Fed'n of the Blind, 487 U.S. 781, 792 (1988). The stated purpose of the Utah Act is "to protect . . . citizens from harmful and injurious acts." Utah Code Ann. § 13-1-1 (1996). The registration and permit provisions require applicants to make detailed disclosure about past activities, including descriptions of any injunction, judgment or administrative order entered against them. Utah Code Ann. § 13-22-9 (Supp. 1999). The grounds for denying a permit center on findings of fraud and misrepresentation. Id. § 13-22-12. The Act's general declarations and specific prohibitions clearly target fraud. The Act therefore serves a substantial government interest.

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[1]American Target contends that we should apply intermediate scrutiny to this content neutral regulation only if we first determine that it is a time, place or manner restriction. The Turner Broadcasting court made no such qualification and we shall not impose one here. In fact, the Supreme Court has suggested that there is no meaningful distinction between evaluation of a content neutral regulation of expressive conduct and a content neutral time, place or manner restriction. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (observing that the test applied to expressive conduct "in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions").

All of the Act's provisions must be narrowly drawn to serve this recognized governmental purpose. We review those statutory provisions construed by the district court to determine whether the state has narrowly tailored them to prevent fraud.

1. Registration and Disclosure Requirements

The Act requires professional fundraising consultants like American Target to meet certain registration and disclosure requirements. Consultants must identify those involved in the solicitation process, disclose the purpose and method of solicitation, declare the existence of any injunctions, judgments, administrative orders, or criminal convictions involving moral turpitude, and provide copies of all agreements concerning fundraising. Id. § 13-22-9.

The Supreme Court has indicated that registration and disclosure provisions do not raise First Amendment problems. In Secretary of State v. Munson, 467 U.S. 947, 968 n.16 (1984), the Court recognized that "concerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct." In Riley, the Court stressed that the state "may constitutionally require fundraisers to disclose certain financial information." Riley, 487 U.S. at 795. The Riley court further found that "the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file." Id. at 800.

publish the detailed financial disclosure forms it requires professional fundraisers to file." Id. at 800.

Mandatory registration and disclosure enable Utah citizens to make informed decisions concerning their charitable donations. These requirements directly promote Utah's legitimate interest in combating fraud while not unnecessarily interfering with solicitors' protected speech. We find that the registration and disclosure provisions of the Utah Act are narrowly tailored to serve the state's substantial interest in fighting fraud.

2. Registration Fee

The Utah Act also requires fundraising consultants to pay an annual registration fee. The fee imposed must be "reasonable, fair and reflect the cost of services provided." Utah Code Ann. § 63-38-3.2(2)(a) (Supp. 1999); Utah Code Ann. § 13-22-9(1)(a) (Supp. 1999). Prior to fiscal year 1997, the state assessed a fee of $150. The Utah Division of Consumer Protection raised the fee to $250 for fiscal year 1997 and thereafter. In an affidavit filed with the district court, Director Giani stated that the Division raised the fee to defray increased regulatory costs caused by a significant jump in applications.

Arguing that the $250 fee is excessive, American Target relies almost exclusively upon Murdock v. Pennsylvania, 319 U.S. 105 (1943). In Murdock, the

that "[f]reedom of speech . . . [should be] available to all, not merely to those who can pay their own way." Id. at 111. The Court recognized some limits to this principle, however. Cataloguing the failings of the license tax at issue, the Court observed that it was not "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." Id. at 113-14. The Court observed that "[t]he constitutional difference between such a regulatory measure and a tax on the exercise of a federal right has long been recognized." Id. at 115 n.8.

Murdock "does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible." Forsyth County v. Nationalist Movement, 505 U.S. 123, 137 (1992). Rather, a regulatory fee may be constitutional only if it serves a "legitimate state interest." Id. The state of Utah, through the Giani affidavit, adequately connects the $250 regulatory fee to the state's recognized interest in protecting its citizenry from fraud. The fee does no more than defray reasonable administration costs. We therefore find the fee narrowly tailored to the identified interest.

3. Bond or Letter of Credit

To obtain a permit under the Act, American Target must also provide proof that it is bonded or provide a letter of credit in the amount of at least $25,000. Utah Code Ann. § 13-22-9(4)(a). The statute requires that the bond or letter of credit "be payable to the state for the

letter of credit in the amount of at least $25,000. Utah Code Ann. § 13-22-9(4)(a). The statute requires that the bond or letter of credit "be payable to the state for the benefit of parties who may be damaged by any violation of this chapter." Id. § 13-22-9(4)(b).

The district court relied upon Dayton Area Visually Impaired Persons v. Fischer, 70 F.3d 1474 (6th Cir. 1995), to uphold the bonding provision.

In Dayton Area, the Sixth Circuit affirmed a district court's holding that a $25,000 surety bond requirement under the Ohio Charitable Solicitations Act was narrowly tailored to serve a legitimate state interest. Id. at 1486. Significantly, the Dayton Area court reviewed a district court's partial grant and partial denial of a preliminary injunction. This procedural posture limited the nature of the First Amendment analysis and limited the court to an abuse of discretion review. In our de novo review, we must decide as a matter of law whether the $25,000 bond is narrowly tailored to the identified state interest. Dayton Area is therefore inapposite.

The bond requirement, on its face, supports a different state interest than the other challenged provisions of the Act. The disclosure and fee requirements enable prophylactic oversight of professional fundraisers. The bond requirement provides a victim relief fund for those injured through violations of the Act. When a professional fundraiser violates the Act, the state naturally expects the violator to satisfy a tort judgment.

Act. Extensive disclosure and vigorous oversight diminish the likely need for a victim compensation fund. An ounce of prevention here is preferable to a pound of cure.

The actual impact of the bond requirement supports our conclusions. The president of American Target, in a sworn affidavit, stated that the company must provide 100 percent collateral for the amount of any outstanding bond. The company does not have enough unpledged collateral on hand to secure the Utah bond and must borrow the full amount. Id. The requirement therefore imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. Bonding may peripherally promote Utah's interest in regulatory oversight, but this goal is "sufficiently served by measures less destructive of First Amendment interests." Village of Schaumburg, 444 U.S. at 636. Through the registration, disclosure and fee requirements, the statute provides less intrusive means of fraud prevention. The chilling financial reality of the bond "unnecessarily interfer[es] with First Amendment freedoms," id. at 637, and is therefore unconstitutional as applied.

Having found the bond provision unconstitutional as applied to American Target, we now must decide whether any attempt to enforce this provision would create "an unacceptable risk of the suppression of ideas." Taxpayers for Vincent, 466 U.S. at 797. We find that it would. There is evidence in the record that qualifying for a letter of credit is much like qualifying for a loan. While some

for Vincent, 466 U.S. at 797. We find that it would. There is evidence in the record that qualifying for a letter of credit is much like qualifying for a loan. While some consultants may qualify for the required letter without 100 percent collateral, this possibility does not save the provision. We are not prepared to allow the constitutionality of this requirement turn on the applicant's credit rating. Furthermore, any posted collateral would go to support victim recovery. We have already found that the guarantee of victim relief only peripherally supports the recognized state interest in regulatory oversight. The chilling impact of the bond upon protected speech outweighs any fraud protection it might provide. We therefore find that the bond/letter of credit provision of the Utah Act is unconstitutional on its face.

B. Severability

Having found one part of the Act unconstitutional, we must decide whether the objectionable provision can be severed. Severability is an issue of state law. Leavitt v. Jane L., 518 U.S. 137, 139 (1996) (per curiam). In Utah, the test is "whether the legislature would have passed the statute without the objectionable part . . . . Frequently the courts are aided in the determination of legislative intent by the inclusion within a statute of a 'saving clause.'" Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 779 (Utah 1994) (quoting Union Trust Co. v. Simmons, 211 P.2d 190, 193 (Utah 1949)).

that the court should conclude the intention was that the statute be effective only in its entirety." Id. The bonding/letter of credit requirement is not interrelated in any meaningful sense with the remainder of the Act. Indeed, on its face, the bonding requirement articulates a different purpose than do the other provisions. Elimination of the bonding requirement therefore will not frustrate the Act's stated purpose. Accordingly, we find that it is severable under Utah law.

C. Prior Restraint

American Target also claims that the Act operates as an impermissible prior restraint upon protected speech. A scheme of prior restraint gives "public officials the power to deny use of a forum in advance of actual expression." Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 553 (1975). American Target is barred from aiding any solicitations within the state until it complies with all the Act's requirements. Utah Code Ann. § 13-22-6(1)(b)(xiv)(B) (Supp. 1999). The Act therefore definitionally qualifies as a prior restraint. Because we have struck the bonding requirement, we consider only whether the other challenged provisions establish an unconstitutional prior restraint.[2]

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[2]Much of the prior restraint law developed in the context of ordinary licensing and zoning schemes. None of the schemes we encountered carried a restraint like the bonding requirement under the Utah Act. Having already found that requirement an unconstitutional burden upon free speech, we do not address how such a restraint would affect our analysis here. We simply note

"Prior restraints are not unconstitutional per se." Southeastern Promotions, 420 U.S. at 558. However, "[a]ny system of prior restraint . . . comes to [the] Court bearing a heavy presumption against its constitutional validity." Id. (internal quotation marks and citation omitted). In particular, there are "two evils" that will not be tolerated in such schemes. FW/PBS, Inc. v. Dallas, 493 U.S. 215, 225 (1990). First, no system of prior restraint may place "'unbridled discretion in the hands of a government official or agency.'" Id. (quoting Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988)). Second, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." Id. at 226.

1. Unbridled Discretion

a) § 13-22-9(1)(b)(xiv)

American Target contends that state officials enjoy too much discretion over the administrative process. The Director of the Division of Consumer Protection has the power to deny, suspend or revoke an application, registration, permit or information card. Utah Code Ann. § 13-22-12(1). To exercise this power, the director must

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encountered carried a restraint like the bonding requirement under the Utah Act. Having already found that requirement an unconstitutional burden upon free speech, we do not address how such a restraint would affect our analysis here. We simply note that so substantial a bonding requirement might operate as a full restraint where applicants cannot muster the required collateral.

grounds set forth in the statute. Id.[3] These grounds

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[3] Section 13-22-12 (1) provides in full:

(1) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to deny, suspend, or revoke an application, registration, permit, or information card, upon a finding that the order is in the public interest and that:

(a) the application for registration or renewal is incomplete or misleading in any material respect;

(b) the applicant or registrant or any officer, director, agent, or employee of the applicant or registrant has:

(i) violated this chapter or committed any of the prohibited acts and practices described in this chapter;

(ii) been enjoined by any court, or is the subject of an administrative order issued in this or another state, if the injunction or order includes a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or if the injunction or order was based on a finding of lack of integrity, truthfulness, or mental competence of the applicant;

(iii) been convicted of a crime involving moral turpitude;

(iv) obtained or attempted to obtain a registration or a permit by misrepresentation;

(v) materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation;

(vi) caused or allowed any paid solicitor to violate any rule made or order issued under this chapter by the division;

(vii) failed reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fund raising counsels or consultants;

(viii) used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names;

(ix) failed to timely file with the division any report

include, among others, the filing of an application that is "incomplete or misleading in any material respect." Id. § 13-22-12(1)(a). The Act also contains a list of specific information which must be included in any application. Id. § 13-22-9.[4] The director retains the authority

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reasonably likely to cause confusion of names;
(ix) failed to timely file with the division any report required in this chapter or by rules made under this chapter; or
(x) failed to pay a fine imposed by the division in accordance with Section 13-22-3;
(c) a professional fund raiser or professional fund raising counselor or consultant does not have a bond or letter of credit in force as required by Subsection 13-22-9(4); or
(d) the applicant for registration or renewal has no charitable purpose.

[4] Section 13-22-9 provides, in relevant part:
(1) It is unlawful for any person or entity to act as a professional fund raiser or professional fund raising counsel or consultant, whether or not representing an organization exempt from registration under Section 13-22-8, without first obtaining a permit from the division by complying with all of the following application requirements:
(a) pay an application fee as determined under Section 63-38-3.2; and
(b) submit a written application, verified under oath, on a form approved by the division that includes:
(i) the applicant's name, address, telephone number, facsimile number, if any;
(ii) the name and address of any organization or person controlled by, controlling, or affiliated with the applicant;
(iii) the applicant's business, occupation, or employment for the three-year period immediately preceding the date of the application;
. . . .

to request "any additional information the division may require." Id. § 13-22-9(1)(b)(xiv). American Target contends that this catch-all provision confers unbridled discretion upon the director: she may demand any piece of information from an applicant and lawfully deny a permit if the applicant refuses such request. We agree.

The state may not condition protected speech "upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official." Staub v. City of Baxley, 355 U.S. 313, 322 (1958). "'[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a

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applicant's conviction of any crime involving moral turpitude;
(x) a copy of any written agreements with any charitable organization;
(xi) the disclosure of any injunction, judgment, or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator, or principal of the applicant;
(xii) a copy of all agreements to which the applicant is, or proposes to be, a party regarding the use of proceeds;
(xiii) an acknowledgment that fund raising in the state will not commence until both the professional fund raiser or professional fund raising counsel or consultant and the charity, its parent foundation, if any, are registered and in compliance with this chapter; and
(xiv) any additional information the division may require.

of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" Forsyth County v. Nationalist Movement, 505 U.S. 123, 131 (1992) (quoting Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969)).

In a facial challenge to a city licensing scheme, the Supreme Court considered a catch-all provision that authorized the imposition of "other terms and conditions deemed necessary and reasonable by the Mayor." City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 754 & n.2 (1988) (internal quotation marks and citation omitted). The Court held that this section of the statute was unconstitutional on its face because it presumed that the mayor would "act in good faith and adhere to standards absent from the ordinance's face." Id. at 770. "The doctrine [forbidding unbridled discretion] requires that the limits the city claims are implicit in its law be made explicit by textual incorporation." Id. Like the catch-all provision in City of Lakewood, § 13-22-9(1)(b)(xiv) confers unconstitutional discretion on the director because it presumes that she will use her blanket authority to request additional information only in good faith and consistent with implicit standards. As a result, § 13-22-9(1)(b)(xiv) threatens to overwhelm the narrow and objective provisions that precede it. Cf. Beal v. Stern, 184 F.3d 117, 126 n.6 (2d Cir. 1999) ("The existence of standards does not in itself preclude a finding of unbridled discretion, for the existence of discretion may turn on the looseness of the standards or

standards meaningless as to some or all persons subject to the prior restraint.").

We therefore hold that § 13-22-9(1)(b)(xiv), construed in light of the director's authority to deny an incomplete application, is unconstitutional on its face and we sever it from the Act.[5] Any attempt by the state to invoke this blanket authority "would create an unacceptable risk of the suppression of ideas." Taxpayers for Vincent, 466 U.S. at 797.

b) § 13-22-12(1)(b)(vii)

Section 13-22-12(1)(b)(vii) authorizes the state to deny a permit if the applicant has "failed reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fundraising counsels or consultants." Instead of providing "narrow, objective and definite standards to guide the director," Shuttlesworth, 394 U.S. at 150-51, this provision imposes a vague requirement: the applicant must "reasonably . . . supervise" its agents and employees. Nowhere does the statute define or limit

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[5] Utah law on severability, see supra Part II.B., requires us to sever this unconstitutional provision. We must decide "whether the remaining sections [of the statute], standing alone, will further the legislative purpose." Stewart, 885 P.2d at 779. The remaining provisions mandate disclosure of an applicant's biographical, financial and criminal background along with copies of relevant agreements. This disclosure enables the state oversight necessary to achieve the Act's stated purpose of "protect[ing] . . . citizens from harmful and injurious acts." Utah Code Ann. § 13-1-1.

and employees. Nowhere does the statute define or limit the nature of such supervision. "Imprecise language may vest authorities with the discretion to determine which groups and individuals are entitled to exercise First Amendment rights." Association of Community Orgs. for Reform Now v. Municipality of Golden, 744 F.2d 739, 747 (10th Cir. 1984).

Given the placement of this provision within the statutory text, we can only speculate as to a limiting construction. Perhaps the provision is designed to merely punish the applicant if an agent or employee violates the Act under his failed supervision. However, we decline to read words into the statute that the Utah Legislature did not ratify. The state must make explicit the necessary limits to the director's discretion. As enacted, § 13-22-12(1)(b)(vii) also confers unbridled discretion on the state and therefore is unconstitutional on its face.[6]

2. Time Limits

Time limits upon a prior restraint allay "the risk of indefinitely suppressing permissible speech." FW/PBS, 493 U.S. at 227. In evaluating a facial challenge to a state act, we must consider the state's own construction of the act, including its implementation and interpretation. Forsyth County, 505 U.S. at 131 (1992).

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[6] Based on the foregoing analysis of severability, we also find this provision severable from the statute as a whole.

applications and renewals of registration be processed within ten days of their receipt by the Division of Consumer Protection. Utah Admin. Code R152-22-3(4) (WESTLAW through July 1999). American Target claims that the ten-day delay for administrative processing is unconstitutionally lengthy.

In Freedman v. Maryland, 380 U.S. 51, 58-60 (1965), the Supreme Court held that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained.[7] Here, the restraint imposed prior to judicial review is both clearly specified and brief. Upon denial of an initial or renewal application, the applicant is entitled to an

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[7] The Freedman court also found that prompt judicial review must be available and that the licensor must bear the burden in court to suppress the protected speech. Freedman, 380 U.S. at 58-59; see also FW/PBS, 493 U.S. at 227 (summarizing the Freedman factors).

The modern interpretation of these Freedman safeguards has provoked some confusion among the circuits. See, e.g., Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1101 (9th Cir. 1998) (summarizing the circuit split over the meaning of prompt judicial review); 11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988, 996 n.12 (4th Cir. 1995) (en banc) (concluding that the splintered opinions in FW/PBS leave the burden of proof safeguard "subject to some speculation"). In its briefs, American Target makes only stray references to the Act's impact on judicial relief. We find such references insufficient to trigger appellate review and therefore do not address the scope of judicial relief necessary under Freedman. See Murrell v. Shalala, 43 F.3d 1388, 1390 n.2 (10th Cir. 1994) (finding that a "few scattered statements" in plaintiff's argument "fail[ed] to frame and develop an issue sufficient to invoke appellate review").

renewal application, the applicant is entitled to an administrative hearing within five business days. Utah Admin. Code R152-22-11(2). Administrative determinations must then be issued within five business days of the hearing. Id.

In addition, the state maintains the status quo during administrative review. The status quo for a new applicant like American Target is non-operation. See East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 225 (6th Cir. 1995) (status quo for business seeking permit is non-operation); TK's Video, Inc. v. Denton County, 24 F.3d 705, 708 (5th Cir. 1994) (applicant not free to operate while license is pending). Thus, Utah's restraint of American Target during the brief period of administrative review is constitutional.

III. Commerce Clause

American Target also claims that the Act as applied places an undue burden upon interstate commerce. We disagree. We review American Target's Commerce Clause challenge de novo. United States v. Hampshire, 95 F.3d 999, 1001 (10th Cir. 1996). The Commerce Clause not only empowers Congress to "regulate Commerce . . . among the several States," U.S. Const. art I, § 8, cl. 3, but also "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce," Oregon Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994). This implied restraint upon the states is often referred to

as the negative or "dormant" aspect of the Commerce Clause.

To evaluate a dormant Commerce Clause challenge, this court must first determine whether the act in question "regulates evenhandedly" among economic interests or instead "discriminates against interstate commerce" either on its face or in practical effect. Oregon Waste Sys., 571 U.S. at 99 (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)). Discrimination in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Id. The Utah Act plainly does not distinguish between in-state and out-of-state businesses. American Target's status as a Virginia corporation doing business in Utah is legally irrelevant. It is American Target's status under the Act as a professional fundraising consultant that triggers the licensing requirements.

Because the Act regulates evenhandedly among in-state and out-of-state consultants, this court must balance various interests in the constitutional assessment. The Act must be upheld if it serves a "legitimate public interest," its effects on interstate commerce are only "incidental," and the burden imposed on interstate commerce is not "clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The party challenging a statute that regulates evenhandedly bears the burden of proving the statute's excess. Dorrance v. McCarthy, 957 F.2d 761, 763 (10th Cir. 1992).

As discussed previously, the Supreme Court has recognized the public interest in curtailing fraudulent solicitations. Riley, 487 U.S. at 792; Village of Schaumburg, 444 U.S. at 637. Because we have found that the bond is an unconstitutional burden upon free speech, the $250 fee, along with the registration and disclosure requirements, remain for our consideration. Since the Act applies to all fundraising consultants who operate within Utah, its provisions certainly burden interstate commerce for out-of-state firms like American Target. However, the burden is minimal. Thus, we must consider whether the identified public purpose could "be promoted as well with a lesser impact on interstate activities." Pike, 397 U.S. at 142. In its legitimate campaign against fraudulent solicitations, the state would be severely hampered if allowed only to regulate in-state solicitors. Therefore, we find that the burdens the Act imposes on interstate commerce are incidental and not clearly excessive in relation to the legitimate public interest.

American Target contends that another line of Commerce Clause authority applies to this case. Citing National Bellas Hess, Inc., v. Department of Revenue, 386 U.S. 753 (1967), and Quill Corp. v. North Dakota, 504 U.S. 298 (1992), American Target identifies a bright-line rule prohibiting the regulation of interstate commerce where the regulated entity's only connection to the state is by common carrier or the U.S. mails. Both Bellas Hess and Quill concern the levy of taxes upon out-of-state entities. The Supreme Court in Quill repeatedly stressed

that it was preserving Bellas Hess' bright-line rule "in the area of sales and use taxes." Quill, 504 U.S. at 316; see also id. at 311 ("Bellas Hess . . . stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."); id. at 317 ("[O]ur reasoning . . . does not compel that we now reject the rule that Bellas Hess established in the area of sales and use taxes."). The Utah Act imposes licensing and registration requirements, not tax burdens. The Bellas Hess/Quill bright-line rule is therefore inapposite.

IV. Due Process

Finally, American Target submits that the Utah Act as applied confers state jurisdiction in a manner inconsistent with due process. Again, we disagree.

The Due Process Clause of the Fourteenth Amendment requires that no state "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, §1. Judicial jurisdiction cannot extend to an individual consistent with due process unless "he have certain minimum contacts [with the jurisdiction] . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The Supreme Court has tailored this jurisdictional principle to the corporate context. "So long

as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-75 (1984)).

In its agreement with Judicial Watch, American Target promises to suggest lists of potential Utah donors, design targeted mailings, help select optimum dates for mailing, and act as a general consultant concerning the solicitation process. To fulfill its obligations under this agreement, American Target must purposefully direct efforts toward residents of the state. Therefore, jurisdiction can be asserted consistent with due process.

Without apparent authority, American Target claims that there must be a higher level of business activity to support the legislative or regulatory jurisdiction asserted here. Charting the due process limits on legislative jurisdiction, the Supreme Court has employed language reminiscent of that used in the personal jurisdiction caselaw. "There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction." Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 315 n.2 (1970) (Harlan, J., dissenting). See generally Adventure Communications v. Kentucky Registry of Election Fin., 191 F.3d 429, 437 (4th Cir. 1999) (concluding that "although not identical, judicial and legislative jurisdiction are determined

pursuant to like guidelines") If there is a distinction to be drawn between the two inquiries, it is not one necessary to the disposition of this matter. American Target has sufficiently satisfied either formulation of minimum contacts to support Utah's assertion of regulatory jurisdiction.

For the reasons discussed above, we AFFIRM in part and REVERSE in part. In addition, we deny the outstanding motion by Appellant American Target to strike the brief of amici curiae Mike Hatch, Minnesota Attorney General, et al., and grant the motion for leave to respond.

AMERICAN TARGET ADVERTISING, INC., a Virginia Corporation, Plaintiff,

v.

FRANCINE A. GIANI in her official capacity as Division Director of the Utah Division of Consumer Protection, Department of Commerce for the State of Utah, Defendant.

No. 2:97CV610 B.

United States District Court,
D. Utah,
Central Division.

Aug. 19, 1998.

Mark F. Fitzgibbons, F. Hayden Codding, Fairfax, VA, for Plaintiff.

Jeffrey Gray, Rebbecca D. Waldron, Salt Lake City, UT, for Defendant.

MEMORANDUM OPINION AND ORDER

BENSON, District Judge.

Plaintiff American Target Advertising, Inc., a Virginia corporation, is a political consulting firm specializing in political fund-raising. American Target filed this lawsuit

against Defendant Francine Giani in her official capacity as Director of the Division of Consumer Protection of the Utah Department of Commerce, seeking to enjoin Utah's enforcement of the Utah Charitable Solicitations Act, codified at Utah Code Ann. § 13-22-1 et seq.

Cross-Motions for Summary Judgment are before the Court.

I. BACKGROUND

A. The Statute

The Utah Charitable Solicitations Act (the Act), codified at Utah Code Ann. § 13-22-1 et seq., establishes a regulatory system for licensing out-of- state professional fund-raising consultants. Under the Act, fund-raising consultants must (1) apply for a license from the state, (2) make financial disclosures to the Utah Division of Consumer Protection, (3) pay a $250 annual registration fee, and (4) secure a $25,000 bond or letter of credit before their clients can solicit contributions in Utah.

After the State has received an application from an out-of-state fund-raising consultant, the Division has ten business days within which to approve or deny the application. Utah Admin.Code R152-22-4(3). The application may be denied or revoked if such action is in

the public interest *and* upon a finding that (1) the application for registration or renewal is incomplete or misleading in any material respect; (2) the applicant has violated the Act or failed to pay a fine imposed under the Act, (3) the applicant has been convicted of a crime involving moral turpitude; (4) an injunction or administrative order has been entered against the applicant in which there was a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or where the injunction or order was based on a finding of lack of integrity, dishonesty, or mental incompetence of the applicant; (5) the consultant has materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation; (6) the consultant has failed reasonably to supervise its agents or employees, (7) the consultant has used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names; or (8) the consultant has failed to secure and/or maintain a $25,000 bond or letter of credit. Utah Code Ann. § 13-22-12.

Those who violate the Act are subject to administrative, civil, or criminal enforcement action. The Director may initiate administrative action to (1) suspend or revoke the registration, (2) order that the consultant cease and desist from its unlawful conduct, or (3) impose an administrative fine. Utah Code Ann. §§ 13-2-3, 6, 12. Any such action is subject to provisions of the

Administrative Procedures Act, Utah Code Ann. § 63-46b-1 et seq., which guarantees the consultant's right to notice and a hearing.

The Division may also seek damages, civil penalties, and injunctive relief in state district court. Utah Code Ann. § 13-22-3. Any civil judgment rendered or administrative fine imposed against a consultant for violating the Act may be recovered from the bond or letter of credit posted by the consultant. Utah Admin.Code R152-22-6 (1996). Any fine or civil penalty imposed must be excused unless it appears, by a preponderance of the evidence, that the consultant acted in bad faith or with intent to harm the public. Utah Code Ann. § 13-22-3(5).

B. Events Leading to this Lawsuit

Plaintiff American Target Advertising, Inc. is a Virginia corporation that provides fund-raising services to nonprofit organizations. On behalf of its clients, American Target uses direct mail to solicit funds from the general public. American Target was retained by Judicial Watch, a nonprofit "political watchdog" organization incorporated in the District of Columbia, to plan, manage, and prepare materials relating to Judicial Watch's nationwide information distribution and fund-raising program.

In February, 1997, Judicial Watch applied for a fund-raising license with the Utah Division of Consumer

Protection. The Division informed Judicial Watch that it would be ineligible for a license unless (a) American Target registered with the Division, (b) Judicial Watch agreed not to pay American Target for its fund-raising consulting services, or (c) Judicial Watch agreed not to use American Target's services in connection with Judicial Watch's fund-raising activities in Utah.

Three months later, the Division granted Judicial Watch a fund-raising license. However, the Division made clear that the issuance of the permit was contingent upon Judicial Watch's promise not to use the services of any professional fund-raising consultant not licensed in Utah in connection with it's fund-raising activities in Utah.

American Target then filed this lawsuit, claiming that the Utah Charitable Solicitations Act is unconstitutional under the First Amendment, the Commerce Clause, and the Due Process Clause of the Fourteenth Amendment. After filing the Complaint, American Target filed a Motion for a Preliminary Injunction. Defendant agreed to the entry of an Order suspending enforcement of the Act with respect to American Target and Judicial Watch during the pendency of this lawsuit. American Target then filed a Motion for Summary Judgment. Defendant opposed that Motion and filed her own Motion for Summary Judgment.

The parties have conducted limited discovery, having taken the depositions of James E.B. Carney, Vice

President of American Target, and Francine A. Giani, Director of the Utah Division of Consumer Protection. The parties have filed a Stipulation of Facts, setting forth facts as to which there is no dispute.

II. DISCUSSION

A. Constitutionality Under the First Amendment

It is beyond dispute that any law that restricts charitable solicitations is subject to First Amendment scrutiny. As the Supreme Court noted in Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), charitable solicitations "involve a variety of speech interests--communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes-- that are within the protection of the First Amendment." Id. at 632, 100 S.Ct. 826.

However, it is equally well-settled that "[s]oliciting financial support is ... subject to reasonable regulation." Id. at 632, 100 S.Ct. 826. In order to survive a First Amendment challenge, a law that regulates charitable solicitations must (1) serve a substantial governmental interest, and (2) be "narrowly drawn ... to serve th[at] interest[ ] without unnecessarily interfering with First Amendment freedoms." Id. at 637, 100 S.Ct. 826. See also, Maryland v. Joseph H. Munson Company, Inc., 467 U.S. 947, 961, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984); Riley v. National Federation of the Blind of North

Carolina, Inc., 487 U.S. 781, 792, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

1. Substantial Interest

First, the Court must determine whether Utah's interest in enacting the legislation is substantial. The State's interest will be deemed substantial if the statute was enacted to " 'protect[ ] the public from fraud, crime, and undue annoyance.' " Village of Schaumburg, 444 U.S. at 635, 100 S.Ct. 826.

The stated purpose of the Act is "to protect [Utah] citizens from harmful and injurious acts." Utah Code Ann. § 13-1-1. TheAct seeks to fulfill this purpose by (1) preventing fraud and (2) providing a means of redress for victims of fraud.

It is undisputed that these interests are substantial, and based in part on past experience with persons who have used charitable fund-raising activities as vehicles for fraud. The Supreme Court has held that "[t]he interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." Riley v. National Federation of the Blind, 487 U.S. 781, 792, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

2. Narrow Tailoring

The second prong of the test requires the Court to determine whether the Act is narrowly tailored. Under this standard, the challenged statute need not constitute the "least restrictive means" of obtaining the legislative objective. See e.g., Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 961, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). In clarifying this standard, the Supreme Court has held that a law is narrowly tailored if it "promotes a substantial governmental interest that would be achieved less effectively absent the regulation." Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

American Target argues that four aspects of the Act fail under the narrow tailoring requirement: (1) the registration and disclosure requirement; (2) the registration fee; (3) the bond or letter of credit requirement; and (4) the allegedly overbroad discretion of the Director of the Division of Consumer Protection.

a. The Registration & Disclosure Requirement

The Act requires fund-raising consultants such as American Target to provide the Division with information about the consultant and its relationship with the charity it consults. The Act also requires the consultant to disclose the nature of any law enforcement actions taken against the consultant, its operators, principals, directors, officers, or managers. Utah Code Ann. § 13-22-9.

Consumers may access this information from the State to verify representations made in solicitations and to assess the reliability and trustworthiness of those who participate in the solicitation process.

The Utah Act's registration and disclosure requirements appear to be consistent with the provisions upheld in Riley v. Federation of the Blind of North Carolina, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). In that case, the Court declared several provisions of North Carolina's charitable solicitations law unconstitutional, but explained that "North Carolina may constitutionally require fund-raisers to disclose certain financial information to the State, as it has since 1981." 487 U.S. at 795, 108 S.Ct. 2667. The Utah Act's registration and disclosure requirements do not differ materially from those upheld in Riley.

The registration and disclosure requirements are narrowly tailored to enable private citizens to protect themselves from fraudulent activity. The information required is relatively simple and readily available to the consultant. As American Target concedes, much of the information required is already available in its own tax forms and fund-raising registration materials in Virginia. The Court concludes that the Act's disclosure and registration requirements are sufficiently narrowly tailored to pass constitutional muster.[1]

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[1]American Target also argues that the registration and disclosure requirements amount to an unconstitutional prior

b. The Registration Fee

American Target also argues that the $250.00 annual registration fee fails under the narrow tailoring requirement. American Target claims that the fee will make the cost of fund-raising so high that mass-mailed interstate charitable solicitations will become impossible.

In considering the constitutional permissibility of registration fees imposed upon professional charitable solicitors in the state of New York, the United States Court of Appeals for the Second Circuit observed:

> It is well-settled that charitable solicitation involves a variety of speech interests protected by the First Amendment. "[I]t is equally clear that

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restraint because consultants must register prior to conducting solicitations. In support of this argument, American Target points out that the Court in Riley struck down a provision requiring the fund-raiser to obtain a license before soliciting.

But the fatal flaw in the North Carolina licensing scheme is not present in the Utah Act. As the Court observed, licensing requirements "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.' " Id. at 802, 108S.Ct. 2667 (quoting Freedman v. Maryland, 380 U.S. 51, 59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)). The Court struck down the law because it did not impose a time limitation on the licensing agency, either by statute or administrative regulation. Id.

Utah's Act contains no such defect. By administrative regulation, the Division must process registration applications "within 10 business days of their receipt by the Division." Utah Admin.Code R152-22-4(3). In this way, the Division can fairly review the application while preserving the First Amendment rights of the consultant by assuring a prompt decision.

> while the exercise of constitutionally protected activities may not be taxed, it may be regulated, provided the regulation is narrowly tailored to achieve a legitimate government interest, is content-neutral in terms and effect, and does not unduly burden speech." Thus, fees that serve not as revenue taxes, but rather as means to meet the expenses incident to the administration of a regulation and to the maintenance of public order in the matter regulated are constitutionally permissible.

National Awareness Foundation v. Abrams, 50 F.3d 1159, 1164-65 (2d Cir.1995) (quoting Center for Auto Safety, Inc. v. Athey, 37 F.3d 139, 144 (4th Cir.1994)) (citations omitted); see also Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474 (6th Cir.1995) (upholding a $200 registration fee for professional solicitors).

American Target's attempt to distinguish National Awareness Foundation v. Abrams and Dayton Area Visually Impaired Persons, Inc. v. Fisher is unpersuasive. American Target argues that these cases are different than the case at bar because they deal with solicitors rather than professional fund- raising counsel. American Target argues that "solicitors" actually perform the act of soliciting money, and typically have possession over the funds that are contributed. But it is beyond dispute that American Target exercises significant control over the fund-raising and the money. Therefore, the fact that

American Target refers to itself as "counsel" rather than as a "solicitor" is irrelevant for our purposes here.

The fee provisions enable the State to defray the costs associated with the administration and enforcement of the Act. The Act itself mandates that the Division set an application fee that is "reasonable, fair, and reflect[s] the cost of services provided." Utah Code Ann. § 13-22-9(1)(a); Utah Code Ann. § 63-3 8-3.2(2). The evidence suggests that the Division complies scrupulously with this mandate, considering the resources it expends in administering and enforcing the Act in establishing the fee. Giani Affidavit, ¶ 7. No evidence in the record suggests that the fee is anything to the contrary. Therefore, the application fee survives constitutional scrutiny.

c. The Bond or Letter of Credit Requirement

For some of the same reasons, American Target argues that the requirement that consultants maintain a bond or letter of credit is unconstitutional. American Target claims that the requirement is more burdensome than necessary, and is not narrowly tailored to serve the State's interest of preventing fraud.

The Court is not convinced. This requirement protects the public by providing a fund from which victims can draw in the event that they are defrauded by charitable solicitors. Simultaneously, it also acts as a deterrent to fraudulent activity--presumably, fund-raisers will be less

likely to defraud Utahns if they know that if they get caught, they will pay for it.

The United States Court of Appeals for the Sixth Circuit recently upheld Ohio's $20,000 bonding requirement, concluding that "because the bonding requirement imposed upon professional solicitors also attempts to deter fraud and to provide a fund from which to compensate charities for moneys lost or misappropriated by the professional solicitors, the district court [correctly] concluded that the requirement was narrowly tailored to serve a legitimate state interest." Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1486 (1995).

Similarly, the bonding or letter of credit requirements in the Utah Act are narrowly tailored to serve the substantial interest of the State in protecting charities and Utah residents from fraud. The State has not required consultants to deposit the entire $25,000 with the State or in an escrow account. Instead, the State has imposed the less-burdensome requirement that the consultant obtain either a bond from a surety company or a letter of credit from the consultant's financial institution. This provides the public with a source from which to draw in the event of loss.

The purpose of the Act could not be accomplished as effectively without such the bond or letter of credit requirement. Accordingly, it survives the scrutiny of the First Amendment.

d. Improper Discretion

Finally, American Target argues that the Act gives the Director of the Division of Consumer Protection improper discretion in issuing fund-raising licenses. The Director may deny or revoke a license if (1) such action is in the public interest and (2) after making a specified finding of wrongdoing under the Act. Utah Code Ann. § 13-22-12. American Target claims that this provision gives the Director unbridled discretion because neither the Act nor any administrative regulations pertaining to its enforcement define what "public interest" is.

However, the Act requires that the Director make a specified finding of wrongdoing before denying or revoking a license. The provision governing specified findings of wrongdoing is quite narrow, giving the Director discretion only where (1) the application for registration or renewal is incomplete or misleading in any material respect; (2) the applicant has violated the Act or failed to pay a fine imposed under the Act, (3) the applicant has been convicted of a crime involving moral turpitude; (4) an injunction or administrative order has been entered against the applicant in which there was a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or where the injunction or order was based on a finding of lack of integrity, dishonesty, or mental incompetence of the applicant; (5) the consultant has materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection

with any solicitation; (6) the consultant has failed reasonably to supervise its agents or employees, (7) the consultant has used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names; or (8) the consultant has failed to secure and/or maintain a $25,000 bond or letter of credit. Utah Code Ann. § 13-22-12.

Because the Director may only invoke her discretion after making a specific finding of wrongdoing in these limited areas, her discretion is quite narrow. In addition, the "public interest" language also places a limitation on the Director's discretion.

The denial and revocation provision does not give the Director undue discretion, and appears reasonably calculated to give the Act reasonable regulatory teeth. The Act could not be enforced as effectively without the provision. Accordingly, the Court concludes that it is narrowly tailored to further the purpose of the Act.

B. Constitutionality Under the Commerce Clause

The Commerce Clause gives Congress the power to regulate commerce "among the several States." United States Constitution Art. 1 § 8, cl. 3. This power is significant in two respects. First, is operates as an affirmative grant of authority, enabling Congress to enact legislation in areas that substantially affect interstate commerce. Second, and relevant here, it limits the states'

police powers by prohibiting state regulations that unduly burden interstate commerce. This limitation of state authority, commonly referred to as the "dormant" Commerce Clause, "is by no means absolute. In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980).

The text of the Commerce Clause provides no guidance on the extent to which states can regulate interstate commerce in the absence of Congressional legislation. It has therefore been left to the courts to delineate the Commerce Clause-imposed boundaries of state regulation.

A state law may be found unconstitutional under the dormant Commerce Clause in either of two situations--either (1) where the state regulation directly regulates or otherwise discriminates against interstate commerce, see e.g., Oregon Waste Systems v. Department of Environmental Quality of the State of Oregon, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), or (2) where the regulation operates in a non-discriminatory manner, burdening interstate commerce only indirectly, and the burden imposed upon interstate commerce is clearly excessive in relation to the putative local benefits, see e.g., Pike v. Bruce Church Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

1. Direct Regulation of Interstate Commerce

American Target first argues that, through the framework established by the Utah Charitable Solicitations Act, the State of Utah is attempting to directly regulate contractual agreements between American Target and its nonprofit clients in other states. While acknowledging that the Act does not discriminate against interstate commerce on its face, American Target claims that the Utah Act is similar to the statute declared unconstitutional in Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) in that it attempts to directly regulate the out-of-state contracts of an out-of-state person, and therefore constitutes a virtual per se violation of the Commerce Clause.

In Brown-Forman, a distiller brought suit when the State of New York began requiring all liquor distillers doing business in New York to sell at a price no higher than the lowest price that the distiller charged anywhere else in the United States. The Supreme Court held that the statute violated the dormant Commerce Clause. Rather than relying on a discrimination rationale,[2] however, the Court attacked the law on grounds that it enabled New York to "project its legislation into" other states. The Court reasoned that the New York law

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[2]The Court declined using the discrimination rationale because the appellant conceded that the statute was "evenhanded."

> [R]egulate[d] out-of-state transactions in violation of the commerce clause. Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the Untied States during the relevant month. **Forcing a [business entity] to seek regulatory approval in one state before undertaking a transaction in another directly regulates interstate commerce.** While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not "project its legislation into [other states] by regulating the price to be paid" for liquor in those states.... That the [law] is addressed only to sales of liquor in New York is irrelevant if the "practical effect" of the law is to control liquor prices in other states.... Moreover, the proliferation of [similar state] laws ... has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different states.... Thus New York has "project[ed]" its legislation into other states, and directly regulated commerce therein, in violation of [the dormant Commerce Clause].

Brown-Forman, 476 U.S. at 582-83, 106 S.Ct. 2080 (emphasis added) (citations omitted).

American Target analogizes its own plight to that of the plaintiff/distiller in Brown-Forman, arguing that Utah attempted to regulate American Target, an out-of-state business. In support of this argument, American Target

points out that the Division of Consumer Protection denied Judicial Watch a license because of its relationship with American Target. Even when the Division later granted the license, it did so only on condition that Judicial Watch not correspond with Utah residents using materials developed with any assistance from American Target.

The Court is not persuaded. Unlike the Brown-Forman plaintiff, American Target's out-of-state activities are not being controlled by an overreaching state statute. American Target is subject to Utah regulation only to the extent that it provides consulting services in connection with charitable solicitations in Utah.

In no way does the Act regulate American Target's consulting services that do not pertain to charitable solicitations in Utah. Simply stated, the Act is not unconstitutional under Brown-Forman because it does not have the " 'practical effect' of ... controll[ing] [professional fund-raisers] in other states." Id. at 582-83, 106 S.Ct. 2080.

2. Indirect Regulation of Interstate Commerce

The Supreme Court's ruling in Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) is said to embody the modern negative Commerce Clause test in cases that do not involve facially discriminatory state regulations. In Pike, the Court held that the State of Arizona could not require Arizona cantaloupe growers to

package their produce in Arizona. The Court explained that where the challenged state statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental" the statute will survive a dormant Commerce Clause attack unless the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142, 90 S.Ct. 844.

While acknowledging that Utah has a "legitimate local public interest" in enforcing the Act, American Target argues that the Act unduly burdens interstate commerce by imposing: (1) the annual application fee of $250.00, (2) the $25,000 bonding requirement, and (3) the registration and disclosure requirements. The party challenging a non-discriminatory statute under the dormant Commerce Clause "bears the burden of showing that the incidental burden on interstate commerce is excessive compared to the local interest." Dorrance v. McCarthy, 957 F.2d 761, 763 (10th Cir.1992). American Target has failed to produce any evidence showing that the incidental burdens that the Act may impose on interstate commerce are clearly excessive in relation to the benefits that the Act produces.

Moreover, as explained above in the Court's discussion of American Target's First Amendment claims, the challenged provisions are reasonably necessary to prevent and remedy the effects of fraud. Any resulting burdens on interstate commerce are minimal by comparison. Accordingly, the Court concludes that the

Act does not run afoul of the dormant Commerce Clause under the Pike v. Bruce Church balancing test.

C. The Charitable Solicitations Act Does Not Violate the Due Process Clause.

American Target also contends that the Act is invalid under the Due Process Clause of the Fourteenth Amendment, arguing that applying the Act to American Target constitutes "an impermissible extra-territorial exercise of the State's police powers." Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 24.

The Court does not agree. American Target plays a most significant role in Judicial Watch's solicitations, including those directed toward Utah. A reading of the Contract between Judicial Watch and American Target reveals that American Target (1) prepares the creative copy and design of the mailings, (2) plans and manages the production services relevant to direct mail solicitations, (3) selects lists of potential donors and identifies dates when mailings should occur, and (4) generally advises Judicial Watch regarding the solicitations. Agreement Between Judicial Watch and American Target, Complaint Exhibit 1, § 1. It is safe to say that American Target is not only Judicial Watch's fund-raising consultant, it is primarily responsible for "build[ing] a [ ] base of supporters across the country" and within Utah. Deposition of American Target Vice President James Carney at 50.

In short, it is safe to say that American Target has " 'purposely directed' " its fund-raising efforts "toward residents of [Utah]." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). In so doing, American Target has established minimum contacts with the State of Utah so as to subject itself to the jurisdiction of Utah courts in matters arising out of or relating to their Utah fund-raising activities. Utah may therefore require American Target to submit to the requirements of the Utah Charitable Solicitations Act without violating the Due Process Clause of the Fourteenth Amendment.

III. CONCLUSION

In accordance with the foregoing, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is DENIED, and Defendant's Motion for Summary Judgment is GRANTED.

Chapter 22

CHARITABLE SOLICITATIONS ACT

13-22-1 Short title.

13-22-2 Definitions.

13-22-3 Investigative and enforcement powers - Education.

13-22-4 Violation a misdemeanor - Damages.

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13-22-6 Application for registration.

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13-22-9 Professional fund raiser's or fund raising counsel's or consultant's permit.

13-22-10 Obtaining, use and display of permits and information cards.

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13-22-17 Written agreement required.

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13-22-21 Tax exempt organizations - Appeal on behalf of individual.

13-22-1. Short title.

This chapter is known as the "Charitable Solicitations Act."

13-22-2. Definitions.

As used in this chapter:

(1) (a) "Charitable organization" or "organization" means any person, joint venture, partnership, limited liability company, corporation, association, group, or other entity, excluding the state and its political subdivisions:

(i) that is or holds itself out to be:

(A) a benevolent, educational, voluntary health, philanthropic, humane, patriotic, religious or eleemosynary, social welfare or advocacy, public health, environmental or conservation, or civic organization;

(B) for the benefit of a public safety, law enforcement, or firefighter fraternal association; or

(C) established for any charitable purpose;

(ii) who solicits or obtains contributions solicited from the public for a charitable purpose; or

(iii) in any manner employs a charitable appeal as the basis of any solicitation or employs an appeal that reasonably suggests or implies that there is a charitable purpose to any solicitation.

(b) "Charitable organization" includes a "chapter," "branch," "area," "office," or similar "affiliate" or any person soliciting contributions within the state for a charitable organization that has its principal place of business outside the state.

(2) "Charitable purpose" means any benevolent, educational, philanthropic, humane, patriotic, religious, eleemosynary, social welfare or advocacy, public health, environmental, conservation, civic, or other charitable objective or for the benefit of a public safety, law enforcement, or firefighter fraternal association.

(3) "Charitable solicitation" or "solicitation" means any request, directly or indirectly, for money, credit, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made in any manner, including:

(a) any oral or written request, including any telephonic request;

(b) the distribution, circulation, or posting of any handbill, written advertisement, or publication; or

(c) the sale of, offer or attempt to sell, or request of donations in exchange for any advertisement, book, card, chance, coupon, device, magazine, membership, merchandise, subscription, ticket, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which any appeal is made for any charitable purpose, or the use of the name of any

charitable organization or movement as an inducement or reason for making any purchase donation, or, in connection with any sale or donation, stating or implying that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose.

(4) (a) "Contribution" means the pledge or grant for a charitable purpose of any money or property of any kind, including any of the following:

(i) a gift, subscription, loan, advance, or deposit of money or anything of value;

(ii) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for charitable purposes; and

(iii) fees, dues, or assessments paid by members, when membership is conferred solely as consideration for making a contribution.

(b) "Contribution" does not include:

(i) money loaned to a charitable organization by a financial institution in the ordinary course of business; or

(ii) fees, dues, or assessments paid by members when membership is not conferred solely as consideration for making a contribution.

(5) "Contributor" means any donor, pledgor, purchaser, or other person who makes a contribution.

(6) "Director" means the director of the Division of Consumer Protection.

(7) "Division" means the Division of Consumer Protection of the Department of Commerce.

(8) "Material fact" means information that a person of ordinary intelligence and prudence would consider relevant in deciding whether or not to make a contribution in response to a charitable solicitation.

(9) (a) "Paid solicitor" means any person who, for financial or other consideration:

(i) solicits contribution for charitable purposes; or

(ii) acts as an employee or agent for any charitable organization or professional fund raiser to solicit contributions for charitable purposes.

(b) "Paid solicitor" does not include any clerical employee who is not primarily involved with soliciting.

(10) (a) "Professional fund raiser," except as provided in Subsection (10)(b), means any person who:

(i) for compensation or any other consideration plans or manages the solicitation of contributions for or on behalf of any charitable organization or any other person;

(ii) engages in, or who holds himself out to persons in this state as being independently engaged in, the business of soliciting contributions for a charitable organization;

(iii) manages, supervises, or trains any paid solicitor; or

(iv) uses a vending device or vending device decal for financial or other consideration that implies a solicitation of contributions or donations for any charitable organization or charitable purposes.

(b) "Professional fund raiser" does not include a bona fide officer, director, volunteer, or full-time employee of a charitable organization.

(11) (a) "Professional fund raising counsel or consultant" or other comparable designation or title means a person who:

(i) for compensation plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization, whether or not at any time the person has custody of contributions from a solicitation;

(ii) does not solicit contributions; and

(iii) does not employ, procure, or engage any compensated person to solicit or receive contributions.

(b) "Professional fund raising counsel or consultant" does not include an attorney, investment counselor, or banker who in the conduct of that person's profession advises a client when actually engaged in the giving of legal, investment, or financial advice.

(12) "Vending device" means a container used by a charitable organization, paid solicitor, or professional fund raiser, for the purpose of collecting a charitable solicitation, contribution, or donation whether or not the device offers a product or item in return for the contribution or donation. "Vending device" includes machines, boxes, jars, wishing wells, barrels, or any other container.

(13) "Vending device decal" means any decal, tag, or similar designation material that is attached to a vending device, whether or not used or placed by a charitable organization, paid solicitor, or professional fund raiser, that would indicate that all or a portion of the proceeds from the purchase of items from the vending device will go to a specific charitable organization.

13-22-3. Investigative and enforcement powers -- Education.

(1) The division may make any investigation it considers necessary to determine whether any person is violating, has violated, or is about to violate any provision of this chapter or any rule made or order issued under this chapter. As part of the investigation, the division may:

(a) require a person to file a statement in writing;

(b) administer oaths, subpoena witnesses and compel their attendance, take evidence, and examine under oath any person in connection with an investigation; and

(c) require the production of any books, papers, documents, merchandise, or other material relevant to the investigation.

(2) Whenever it appears to the director that substantial evidence exists that any person has engaged in, is engaging in, or is about to engage in any act or practice prohibited in this chapter or constituting a violation of this chapter or any rule made or order issued under this chapter, the director may do any of the following in addition to other specific duties under this chapter:

(a) in accordance with Title 63, Chapter 46b, Administrative Procedures Act, the director may issue an order to cease and desist from engaging in the act or practice or from doing any act in furtherance of the activity; or

(b) the director may bring an action in the appropriate district court of this state to enjoin the acts or practices constituting the violation or to enforce compliance with this chapter or any rule made or order issued under this chapter.

(3) Whenever it appears to the director by a preponderance of the evidence that a person has engaged in or is engaging in any act or practice prohibited in this chapter or constituting a violation of this chapter or any rule made or order issued under this chapter, the director may assess an administrative fine of up to $500 per violation up to $10,000 for any series of violations arising out of the same operative facts.

(4) Upon a proper showing, the court hearing an action brought under Subsection (2)(b) may:

(a) issue an injunction;

(b) enter a declaratory judgment;

(c) appoint a receiver for the defendant or the defendant's assets;

(d) order disgorgement of any money received in violation of this chapter;

(e) order rescission of agreements violating this chapter;

(f) impose a fine of not more than $2,000 for each violation of this chapter; and

(g) impose a civil penalty, or any other relief the court considers just.

(5) (a) In assessing the amount of a fine or penalty under Subsection (3), (4)(f), or (4)(g), the director or court imposing the fine or penalty shall consider the gravity of the violation and the intent of the violator.

(b) If it does not appear by a preponderance of the evidence that the violator acted in bad faith or with intent to harm the public, the director or court shall excuse payment of the fine or penalty.

(6) The division may provide or contract to provide public education and voluntary education for applicants and registrants under this chapter. The education may be in the form of publications, advertisements, seminars,

courses, or other appropriate means. The scope of the education may include:

(a) the requirements, prohibitions, and regulated practices under this chapter;

(b) suggestions for effective financial and organizational practices for charitable organizations;

(c) charitable giving and solicitation;

(d) potential problems with solicitations and fraudulent or deceptive practices; and

(e) any other matter relevant to the subject of this chapter.

13-22-4. Violation a misdemeanor -- Damages.

(1) A person who willfully violates any provision of this chapter, either by failing to comply with any requirement or by doing any act prohibited in the chapter, is guilty of a class B misdemeanor. Each day the violation is committed or permitted to continue constitutes a separate punishable offense.

(2) Nothing in this section precludes any person damaged as a result of a charitable solicitation from maintaining a civil action for damages or injunctive relief.

(3) The division may maintain an action for damages or injunctive relief on behalf of itself or any other person to enforce compliance with this chapter.

13-22-5. Registration required.

(1) It is unlawful for any organization that is not exempt under Section 13-22-8 to knowingly solicit, request, promote, advertise, or sponsor the solicitation in this state of any contribution for a charitable purpose, unless the organization is registered with the division.

(2) Subsection (1) does not prohibit an organization from receiving an unsolicited contribution.

(3) It is unlawful for any professional fund raiser to knowingly solicit, request, promote, advertise, or sponsor the solicitation in this state of any contribution for a charitable organization, whether or not the charitable organization is exempt under Section 13-22-8, unless the professional fund raiser is registered with the division.

(4) It is unlawful for any professional fund raising counsel or consultant to knowingly plan, manage, advise, counsel, consult, or prepare material for, or with respect to, the solicitation in this state of a contribution for a charitable organization, whether or not the charitable organization is exempt under Section 13-22-8, unless the professional fund raising counsel or consultant is registered with the division.

13-22-6. Application for registration.

(1) An applicant for registration or renewal of registration as a charitable organization shall:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit a written application, verified under oath, on a form approved by the division which shall include:

(i) the organization's name, address, telephone number, facsimile number, if any, and the names and addresses of any organizations or persons controlled by, controlling, or affiliated with the applicant;

(ii) the specific legal nature of the organization, that is, whether it is an individual, joint venture, partnership, limited liability company, corporation, association, or other entity;

(iii) the names and residence addresses of the officers and directors of the organization;

(iv) the name and address of the registered agent for service of process and a consent to service of process;

(v) the purpose of the solicitation and use of the contributions to be solicited;

(vi) the method by which the solicitation will be conducted and the projected length of time it is to be conducted;

(vii) the anticipated expenses of the solicitation, including all commissions, costs of collection, salaries, and any other items;

(viii) a statement of what percentage of the contributions collected as a result of the solicitation are projected to remain available for application to the charitable purposes declared in the application, including

a satisfactory statement of the factual basis for the projected percentage;

(ix) a statement of total contributions collected or received by the organization within the calendar year immediately preceding the date of the application, including a description of the expenditures made from or the use made of the contributions;

(x) a copy of any written agreements with any professional fund raiser involved with the solicitation;

(xi) disclosure of any injunction, judgment, or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator, or principal of the organization;

(xii) a copy of all agreements to which the applicant is, or proposes to be, a party regarding the use of proceeds for the solicitation or fundraising;

(xiii) a statement of whether or not the charity, or its parent foundation, will be using the services of a professional fund raiser or of a professional fund raising counsel or consultant;

(xiv) if either the charity or its parent foundation will be using the services of a professional fund raiser or a professional fund raising counsel or consultant:

(A) a copy of all agreements related to the services; and

(B) an acknowledgment that fund raising in the state will not commence until both the charitable organization,

its parent foundation, if any, and the professional fund raiser or professional fund raising counsel or consultant are registered and in compliance with this chapter; and

(xv) any additional information the division may require by rule.

(2) If any information contained in the application for registration becomes incorrect or incomplete, the applicant or registrant shall, within 30 days after the information becomes incorrect or incomplete, correct the application or file the complete information required by the division.

(3) In addition to the registration fee, an organization failing to file a registration application or renewal by the due date or filing an incomplete registration application or renewal shall pay an additional fee of $25 for each month or part of a month after the date on which the registration application or renewal were due to be filed.

13-22-7. Repealed.

13-22-8. Exemptions.

(1) Section 13-22-5 does not apply to:

(a) a solicitation that an organization conducts among its own established and bona fide membership exclusively through the voluntarily donated efforts of other members or officers of the organization;

(b) a bona fide religious, ecclesiastical, or denominational organization if:

(i) the solicitation is made for a church, missionary, religious, or humanitarian purpose; and

(ii) the organization is:

(A) a lawfully organized corporation, institution, society, church, or established physical place of worship, at which nonprofit religious services and activities are regularly conducted and carried on;

(B) a bona fide religious group:

(I) that does not maintain specific places of worship;

(II) that is not subject to federal income tax; and

(III) not required to file an IRS Form 990 under any circumstance; and

(C) a separate group or corporation that is an integral part of an institution that is an income tax exempt organization under 26 U.S.C. Sec. 501(c)(3) and is not primarily supported by funds solicited outside its own membership or congregation;

(c) a solicitation by a broadcast media owned or operated by an educational institution or governmental entity, or any entity organized solely for the support of that broadcast media;

(d) except as provided in Subsection 13-22-21(1), a solicitation for the relief of any person sustaining a life-threatening illness or injury specified by name at the time of solicitation if the entire amount collected without any deduction is turned over to the named person;

(e) a political party authorized to transact its affairs within this state and any candidate and campaign worker of the party if the content and manner of any solicitation make clear that the solicitation is for the benefit of the political party;

(f) a political action committee or group soliciting funds relating to issues or candidates on the ballot if the committee or group is registered with the lieutenant governor's office under:

(i) Title 20A, Chapter 11, Part 6, Political Action Committee Registration and Financial Reporting Requirements; or

(ii) Title 20A, Chapter 11, Part 8, Political Issues Committees - Registration and Financial Reporting;

(g) any school accredited by the state, any accredited institution of higher learning, or club or parent, teacher, or student organization within and authorized by the school in support of the operations or extracurricular activities of the school;

(h) a public or higher education foundation established under Title 53A or 53B;

(i) a television station, radio station, or newspaper of general circulation that donates air time or print space for no consideration as part of a cooperative solicitation effort on behalf of a charitable organization, whether or not that organization is required to register under this chapter; and

(j) a volunteer fire department, rescue squad, or local civil defense organization whose financial oversight is under the control of a local governmental entity.

(2) Any organization claiming an exemption under this section bears the burden of proving its eligibility for, or the applicability of, the exemption claimed.

(3) Each organization exempt from registration pursuant to this section that makes a material change in its legal status, officers, address, or similar changes shall file a report informing the division of its current legal status, business address, business phone, officers, and primary contact person within 30 days of the change.

(4) The division may by rule:

(a) require organizations exempt from registration pursuant to this section to file a notice of claim of exemption;

(b) prescribe the contents of the notice of claim; and

(c) require a filing fee for the notice, as determined under Section 63-38-3.2.

13-22-9. Professional fund raiser's or fund raising counsel's or consultant's permit.

(1) It is unlawful for any person or entity to act as a professional fund raiser or professional fund raising counsel or consultant, whether or not representing an organization exempt from registration under Section 13-22-8, without first obtaining a permit from the

division by complying with all of the following application requirements:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit a written application, verified under oath, on a form approved by the division that includes:

(i) the applicant's name, address, telephone number, facsimile number, if any;

(ii) the name and address of any organization or person controlled by, controlling, or affiliated with the applicant;

(iii) the applicant's business, occupation, or employment for the three-year period immediately preceding the date of the application;

(iv) whether it is an individual, joint venture, partnership, limited liability company, corporation, association, or other entity;

(v) the names and residence addresses of any officer or director of the applicant;

(vi) the name and address of the registered agent for service of process and a consent to service of process;

(vii) if a professional fund raiser:

(A) the purpose of the solicitation and use of the contributions to be solicited;

(B) the method by which the solicitation will be conducted and the projected length of time it is to be conducted;

(C) the anticipated expenses of the solicitation, including all commissions, costs of collection, salaries, and any other items;

(D) a statement of what percentage of the contributions collected as a result of the solicitation are projected to remain available to the charitable organization declared in the application, including a satisfactory statement of the factual basis for the projected percentage and projected anticipated revenues provided to the charitable organization, and if a flat fee is charged, documentation to support the reasonableness of the flat fee; and

(E) a statement of total contributions collected or received by the professional fund raiser within the calendar year immediately preceding the date of the application, including a description of the expenditures made from or the use made of the contributions;

(viii) if a professional fund raising counsel or consultant:

(A) the purpose of the plan, management, advise, counsel or preparation of materials for, or respect to the solicitation and use of the contributions solicited;

(B) the method by which the plan, management, advise, counsel, or preparation of materials for, or respect

to the solicitation will be organized or coordinated and the projected length of time of the solicitation;

(C) the anticipated expenses of the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation, including all commissions, costs of collection, salaries, and any other items;

(D) a statement of total fees to be earned or received from the charitable organization declared in the application, and what percentage of the contributions collected as a result of the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation are projected after deducting the total fees to be earned or received remain available to the charitable organization declared in the application, including a satisfactory statement of the factual basis for the projected percentage and projected anticipated revenues provided to the charitable organization, and if a flat fee is charged, documentation to support the reasonableness of such flat fee; and

(E) a statement of total net fees earned or received within the calendar year immediately preceding the date of the application, including a description of the expenditures made from or the use of the net earned or received fees in the planning, management, advising, counseling, or preparation of materials for, or respect to the solicitation and use of the contributions solicited for the charitable organization;

(ix) disclosure of any injunction, judgment, or administrative order against the applicant or the applicant's conviction of any crime involving moral turpitude;

(x) a copy of any written agreements with any charitable organization;

(xi) the disclosure of any injunction, judgment, or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator, or principal of the applicant;

(xii) a copy of all agreements to which the applicant is, or proposes to be, a party regarding the use of proceeds;

(xiii) an acknowledgment that fund raising in the state will not commence until both the professional fund raiser or professional fund raising counsel or consultant and the charity, its parent foundation, if any, are registered and in compliance with this chapter; and

(xiv) any additional information the division may require.

(2) If any information contained in the application for a permit becomes incorrect or incomplete, the applicant or registrant shall, within 30 days after the information becomes incorrect or incomplete, correct the application or file the complete information required by the division.

(3) In addition to the permit fee, an applicant failing to file a permit application or renewal by the due date or filing an incomplete permit application or renewal shall pay an additional fee of $25 for each month or part of a month after the date on which the permit application or renewal were due to be filed.

(4) (a) Each applicant shall provide proof that the applicant is either bonded or provide a letter of credit in the amount of at least $25,000.

(b) The bond or letter or credit shall be payable to the state for the benefit of parties who may be damaged by any violation of this chapter.

(c) (i) The issuer of a bond shall be a surety authorized to transact surety business in this state.

(ii) The letter of credit shall be from a federally insured depository institution.

(d) The applicant shall maintain the bond or letter of credit for the entire duration of the permit and for a period of not less than one year after the division received notice in writing from the professional fund raiser or professional fund raising counsel or consultant that all activities in the state have ceased.

(e) The division may prescribe rules under which parties may recover on the bond or letter of credit.

13-22-10. Use and display of permits and information cards.

(1) (a) Each paid solicitor who makes a person-to-person solicitation for a charitable organization registered or required to be registered under this chapter shall, before making the solicitation, obtain an information card issued by the division.

(b) An information card may be obtained from:

(i) the division; or

(ii) if the charitable organization has obtained information cards under Subsection (2), from the charitable organization for whom the solicitation is being made.

(2) A charitable organization registered under this chapter may obtain information cards from the division upon payment of a $2 fee for each card. The charitable organization may distribute an information card only to a paid solicitor employed by the charitable organization.

(3) Each permit and information card issued by the division shall set forth such information as will assist any person solicited to determine the purpose for which the contribution is solicited, including:

(a) (i) if it is an information card or a professional fund raiser permit, the identity of the person making the solicitation;

(ii) if the permit is for a charitable organization, the identity of the organization;

(iii) if it is an information card, the identity of the organization for which the contribution is solicited;

(b) an official acknowledgment or seal that the permit is issued by the division or, in the case of an information card, that the card is on a form supplied by the division;

(c) the statement required under Subsection 13-22-14(2);

(d) the expiration date of the permit or information card; and

(e) any other information that the division may prescribe by rule.

(4) In any solicitation in person, each holder of a permit or information card shall maintain in his possession the permit or information card and shall display the permit or information card to each person solicited. In any telephonic solicitation, the information contained on the permit or information card shall be distinctly and clearly repeated as part of the solicitation.

(5) The division may by rule prescribe additional provisions to govern the manner of using, displaying, or communicating the information on the permit or information card in connection with a solicitation.

(6) A person who solicits contributions for no compensation is not required to have an information card but shall clearly inform the person solicited of the

charitable organization on whose behalf the person is soliciting.

13-22-11. Expiration of registration and permits.

(1) Each charitable organization registration issued under this chapter expires annually on the earlier of January 1, April 1, July 1, or October 1 following the completion of 12 months after the date of initial issuance.

(2) Each professional fund raiser's permit issued under this chapter expires the earlier of:

(a) annually on the date of issuance; or

(b) when the professional fund raiser ceases affiliation with the charitable organization named in the application for permit.

(3) Each professional fund raising counsel's or consultant's permit issued under this chapter expires the earlier of:

(a) annually on the date of issuance; or

(b) when the professional fundraising counsel or consultant ceases affiliation with the charitable organization named in the application for permit.

(4) A registration or permit may be renewed only by complying with the requirements for obtaining the original registration or permit.

13-22-12. Grounds for denial, suspension, or revocation.

(1) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to deny, suspend, or revoke an application, registration, permit, or information card, upon a finding that the order is in the public interest and that:

(a) the application for registration or renewal is incomplete or misleading in any material respect;

(b) the applicant or registrant or any officer, director, agent, or employee of the applicant or registrant has:

(i) violated this chapter or committed any of the prohibited acts and practices described in this chapter;

(ii) been enjoined by any court, or is the subject of an administrative order issued in this or another state, if the injunction or order includes a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or if the injunction or order was based on a finding of lack of integrity, truthfulness, or mental competence of the applicant;

(iii) been convicted of a crime involving moral turpitude;

(iv) obtained or attempted to obtain a registration or a permit by misrepresentation;

(v) materially misrepresented or caused to be misrepresented the purpose and manner in which

contributed funds and property will be used in connection with any solicitation;

(vi) caused or allowed any paid solicitor to violate any rule made or order issued under this chapter by the division;

(vii) failed reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fund raising counsels or consultants;

(viii) used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names;

(ix) failed to timely file with the division any report required in this chapter or by rules made under this chapter; or

(x) failed to pay a fine imposed by the division in accordance with Section 13-22-3;

(c) a professional fund raiser or professional fund raising counselor or consultant does not have a bond or letter of credit in force as required by Subsection 13-22-9(4); or

(d) the applicant for registration or renewal has no charitable purpose.

(2) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to revoke or suspend a claim of exemption filed

under Subsection 13-22-8(4), upon a finding that the order is in the public interest and that:

(a) the notice of claim of exemption is incomplete or false or misleading in any material respect; or

(b) any provision of this chapter, or any rule made or order issued by the division under this chapter has been violated in connection with a charitable solicitation by any exempt organization.

13-22-13. Prohibited practices.

In connection with any solicitation, each of the following acts and practices is prohibited:

(1) stating or implying that registration constitutes endorsement or approval by the division or any governmental entity;

(2) violating any of the requirements of this chapter or any rule made under this chapter;

(3) making any untrue statement of a material fact or failing to state a material fact necessary to make statements made, in the context of the circumstances under which they are made, not misleading, whether in connection with a charitable solicitation or a filing with the division; and

(4) violating an order issued by the division under Subsection 13-22-3(2) or (3).

13-22-14. Accuracy not guaranteed.

(1) By issuing a permit or by providing forms for an information card, the state does not guarantee the accuracy of any representation contained in the permit or information card, nor does it warrant that any statement made by the holder of the permit or information card is truthful. The state makes no certification as to the charitable worthiness of any organization on whose behalf a solicitation is made nor as to the moral character of the holder of the permit or information card.

(2) The following statement shall appear on each permit and information card in uppercase letters, in close proximity to the seal or acknowledgment required under Subsection 13-22-10(3)(b): "THE STATE OF UTAH DOES NOT WARRANT THAT THE INFORMATION CONTAINED ON THIS CARD IS TRUE."

13-22-15. Financial reports required.

(1) Each charitable organization registered under this chapter shall, during its first year of registration, provide quarterly financial reports to the division within 30 days after the end of the quarter reported. Each report shall disclose:

(a) the gross amount of contributions received;

(b) the amount of contributions disbursed or to be disbursed to each charitable organization or charitable purpose represented;

(c) aggregate amounts paid to any professional fund raiser;

(d) amounts spent for overhead, expenses, commissions, and similar purposes; and

(e) the name and address of any paid solicitor used by the organization.

(2) After the first year of continuous registration, a charitable organization shall file an annual financial report or IRS Form 990 on an annual basis within 30 days after the end of the year reported.

(3) Each report required under this section shall be signed under oath by an officer or principal of the organization.

(4) The registration of any organization that fails to file a timely report or IRS Form 990 as required in this section or files an incomplete report or IRS Form 990 is automatically suspended pending a final order of the division under Section 13-22-12. The division may reinstate the registration after receiving:

(a) a report or IRS Form 990 fulfilling the requirements of this section;

(b) an application for renewed registration; and

(c) a penalty of $25 for each month or part of a month after the date on which the quarterly report or IRS Form 990 was due to be filed.

13-22-16. Separate accounts and receipts required.

(1) Each organization required to be registered under this chapter and each professional fund raiser and paid solicitor shall segregate and maintain all contributed funds in an account held separately from its operating account. The account shall be held in Utah at a depository institution regulated by the Department of Financial Institutions.

(2) Each organization required to be registered under this chapter and each professional fund raiser and paid solicitor shall maintain and use duplicate receipts for contributions of money, securities, and cash equivalents so that one receipt is issued to each contributor and one is maintained by the organization.

13-22-17. Written agreement required.

(1) A professional fund raiser may only engage in activities on behalf of a charitable organization through written agreement with the organization.

(2) A professional fund raising counsel or consultant may only engage in activities on behalf of a charitable organization through written agreement with the organization.

(3) A charitable organization may only engage the services of a professional fund raiser or professional fund raising counsel or consultant through written agreement.

(4) Copies of the agreement required by this section shall be attached to all applications for registration and or a permit.

13-22-18. Local ordinance.

This chapter does not prohibit any political subdivision of the state from enacting any ordinance regulating the solicitation of contributions within the subdivision's boundaries so long as the ordinance only coordinates enforcement of this chapter with the division.

13-22-19. Reciprocal agreements.

(1) The division may convey or exchange information obtained under this chapter with other agencies having regulatory authority over charitable organizations.

(2) The division may accept information that a charitable organization or professional fund raiser files in another state or with any federal agency or other organization in place of substantially similar information that is required to be filed under this chapter.

13-22-20. Renumbered.

13-22-21. Tax exempt organizations -- Appeal on behalf of individual.

(1) If a charitable campaign consisting of exempt solicitations for the relief of a named individual sustaining a life-threatening illness or injury, as described in Subsection 13-22-8(1)(d), collects proceeds in excess of $1,000, the organizer of the

campaign shall give the division written notice of the following:

(a) the organizer's name and address;

(b) the name, whereabouts, and present condition of the person for whose relief the contributions are solicited including a letter from the person's attending physician detailing the illness or injury;

(c) the date the charitable campaign commenced; and

(d) the purpose to which the collected contributions are to be applied.

(2) Notice under Subsection (1) is due within ten days after commencing the appeal or collecting in excess of $1,000, whichever is later.

(3) If the organizer fails to file timely notice, the division shall inform the organizer of the notice requirement and give the organizer ten additional days as a grace period within which to file the notice. If the organizer fails to file the notice within the grace period, the division may issue a cease and desist order against the organizer.

(4) If, at any time, the division has reasonable cause to believe that the organizer is perpetrating a fraud against the public, or in any other way intends to profit from harming the public through the charitable campaign, it shall issue a cease and desist order against the organizer.

R152-22-6. Recovery Against Professional Fund Raiser, Professional Fund Raising Counsel or Consultant Bond.

(1) Any person who is injured through the violation of the Act by a professional fund raiser, professional fund raising counsel or consultant is entitled to recover the value of such losses from the professional fund raiser's, professional fund raising counsel's or consultant's bond.

(2) The division also may recover from the bond of a professional fund raiser the amount of any administrative fine it imposes, or the amount of any civil judgments it obtains, against the professional fund raiser, professional fund raising counsel or consultant arising from a violation of the Act.

(3) payment is immediately due and owing to the division when:

(a) the director delivers a signed writing to the professional fund raiser's, professional fund raising counsel's or consultant's surety demanding payment of a specified sum of money; and

(b) the professional fund raiser's, professional fund raising counsel's or consultant's liability in the amount specified by the director is demonstrated by a certified copy of the division's final order or the civil judgment of any Utah or federal court, which copy shall be attached to the director's demand for payment.

(4) The division may make a demand on a bond either in its own right or as the representative of consumers who have been injured by the professional fund raiser's violation of the Act.

(5) Bonds submitted may be executed in any form that the director deems commercially and legally reasonable and consistent with this rule. The division's acceptance of a non-conforming instrument does not result in a waiver of the requirements of this rule.

(2)

No. 99-1829

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IN THE

Supreme Court of the United States

FRANCINE A. GIANI,
DIRECTOR, UTAH DIVISION OF CONSUMER PROTECTION,
Cross-Petitioner,

v.

AMERICAN TARGET ADVERTISING, INC.,
Cross-Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

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14pp

QUESTION PRESENTED

Whether cross-respondent, a Virginia corporation that provides advice and consulting services to organizations engaged in direct mail communications that contain requests for voluntary contributions, may be required by the state of Utah to post a $25,000 bond or letter of credit before its clients are permitted to send mail into Utah, even though cross-respondent does not engage in solicitation and has no contact with Utah citizens.

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BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

STATEMENT

Cross-respondent American Target Advertising (ATA), petitioner in No. 99-1647, is a Virginia corporation that provides advice and consulting services to organizations that use direct mail to publicize their views and to seek adherents and contributions. ATA challenged the constitutionality of the Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 *et seq.* That Act requires ATA and other fund-raising consultants to comply with numerous registration and disclosure requirements before any nonprofit organization they advise may send mail into Utah containing a solicitation. The provisions of the Utah Act apply to ATA even though ATA itself conducts no solicitations, sends no mail into Utah, and has no contacts with the state, other than the provision of

advice and counsel to an organization that engages in direct mail fundraising in the state.

We describe the background of this case in the petition in No. 99-1647. See 99-1647 Pet. 2-7. In brief, the United States Court of Appeals for the Tenth Circuit held that most provisions of the Utah Act could constitutionally be applied to ATA. See 99-1647 Pet. App. 1a-20a. In No. 99-1647, ATA seeks review of that decision insofar as it upholds portions of the Utah Act. In a few respects, however, the Tenth Circuit held the Utah Act unconstitutional. In this case, cross-petitioner challenges the Tenth Circuit's invalidation of a provision of the Act that requires fundraising consultants to obtain a $25,000 bond or letter of credit as a condition for registering in Utah. See Utah Code Ann. §§ 13-22-9(4); 99-1647 Pet. App. 7a-9a.

In holding the bond provision unconstitutional, the court of appeals stated that the "actual impact of the bond requirement" is to "impose[] a sizeable price tag upon the enjoyment of a guaranteed freedom." 99-1647 Pet. App. 8a. The court noted that ATA's president, in a sworn affidavit, had stated that ATA would have to provide 100% collateral for any bond and, because it did not have enough unpledged collateral on hand, would have to borrow the entire amount. *Ibid.* The court of appeals remarked that "some consultants may qualify for the required letter [of credit] without 100% collateral," but the court stated that "this possibility does not save the provision" because "the constitutionality of [the bond] requirement" should not "turn on the applicant's credit rating." *Id.* at 8a-9a. The court concluded that "[t]he chilling impact of the bond upon protected speech outweighs any fraud protection it might provide." *Id.* at 9a. Indeed, the court concluded that the Utah Act imposed so many other disclosure and registration requirements on organizations like ATA that the bond requirement was simply unnecessary. See *id.* at 8a-9a.

ARGUMENT

Cross-petitioner contends that the Tenth Circuit's decision invalidating the bond requirement is incorrect. Cross-petitioner further argues that this issue is an important one (99-1829 Pet. 8), and she asserts that the Tenth Circuit's decision on this issue conflicts with the decision of another court of appeals (*id.* at 15-16).

We agree with cross-petitioner that the issues raised by the Utah Act are, in general, of the first importance. As we explained in the petition in No. 99-1647, regulatory schemes like Utah's are common among the states, and an increasing number of local governments have enacted them as well. See 99-1647 Pet. 7-8. These regulations have potentially enormous ramifications for the free flow of information and opinion throughout the United States. Moreover, while cross-petitioner has not shown a conflict in the circuits, she is correct in saying that there is much confusion and disarray in the lower courts over the important constitutional issues raised by the Utah Act. The cross-petition thus buttresses our arguments for granting the petition in No. 99-1647.

The court of appeals' decision to invalidate the bond requirement was, however, correct. Moreover, if the Court grants the petition in No. 99-1647, its resolution of the questions presented by that petition will provide the framework needed to determine, on remand, the constitutionality of the bond requirement, should a remand be necessary. For these reasons, we believe it would serve no purpose for the Court to grant plenary review of the conditional cross-petition.

1. The arguments we make in the petition in No. 99-1647 apply equally to the bond provision, and they demonstrate why the court of appeals was correct in its conclusion that that

provision violates the First Amendment.[1] The bond requirement, like the other registration and disclosure requirements that the Utah Act imposes on fundraising consultants, is a content-based prior restraint on core political expression. See 99-1647 Pet. 9-16. As such, it is "'subject to exacting scrutiny.'" *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995), quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988). The court below subjected the Utah Act only to intermediate scrutiny (see 99-1647 Pet. App. 4a), even though the Utah Act is manifestly not a time, place, and manner regulation, but rather prohibits speech entirely when its requirements are not met. Thus the court of appeals treated the Act, including the bond requirement, much more favorably than it should have been treated.

Nevertheless, even the court of appeals, applying the weaker First Amendment standard of intermediate scrutiny, perceived the paucity of the state's justifications for the bond requirement. In fact, under any standard of review, the state has—as we showed in our petition—simply provided no reason for the bond requirement, or any of the other registration and disclosure requirements imposed on fundraising consultants. The state has never explained why it cannot accomplish its objectives by reasonable regulation of the organizations that themselves solicit in Utah, without imposing a prior restraint on fundraising consultants that have no contact with Utah citizens.

The cross-petition asserts (99-1829 Pet. 10-12) that the bond requirement is needed in order to deter fraud and to provide compensation for victims. But cross-petitioner fails to explain why the state singles out for a bond requirement organizations like ATA that have no contact with Utah

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[1] For the reasons stated in the petition in No. 99-1647, the bond requirement also violates the Commerce Clause and the Due Process Clause. See 99-1647 Pet. 16-20.

citizens and that are in the business of providing services and advice—a form of speech—to nonprofit organizations that are themselves engaged in core political speech.

In this regard, the examples offered in the cross-petition of other Utah bond requirements—imposed on health spa operators and on telephone solicitors (99-1829 Pet. 11)—are revealing (although they are of course irrelevant to the merits of the issues presented by this case). Both health spa operators and telephone solicitors come into direct contact with Utah citizens. Health spa operators can claim no First Amendment protection; ATA and other fundraising consultants, by contrast, can legitimately assert both their own First Amendment rights and those of their clients. Health spa operators typically operate within the state, and therefore are most unlikely to be able to raise any of the Commerce Clause or Due Process Clause arguments that can be raised by ATA—an out-of-state firm that provides out-of-state services to organizations that merely mail letters in interstate commerce into Utah. And of course ATA is being regulated not as a solicitor, or even as a firm that engages in direct mailings, but as a consultant. Thus cross-petitioner's own examples point up not only the wholly unwarranted character of the requirements imposed on organizations like ATA but the threat that the selective imposition of such requirements presents to First Amendment (and other) rights.[2]

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[2] Similarly, cross-petitioner's assertion that the bond requirement is needed to provide for redress "[i]n today's national and global economy" (99-1829 Pet. 11-12) reveals the incompatibility of cross-petitioner's arguments with the Commerce Clause. If cross-petitioner's approach were to prevail, small businesses (or even individuals) who provide consulting services could, in principle, be required to post bonds in all fifty states merely because their clients engage in interstate commerce. This would create an insurmountable barrier to interstate commerce, and would violate the principles of fair play and substantial justice established by the Due Process Clause.

2. Although the court below correctly recognized that the bond requirement is very burdensome, the court greatly underestimated the magnitude of the burden. That is because organizations like ATA must, of course, comply not just with Utah's requirements but with the requirements of every state—and every locality—that requires a bond or that imposes some other requirement.[3] Cf. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759 (1967). As burdensome as Utah's $25,000 bond requirement is, the cumulative effect of, potentially, dozens or even hundreds of such requirements could be financially incapacitating. Even leaving aside local governments, state bonding requirements alone could potentially require ATA to make annual interest payments in the hundreds of thousands of dollars and post collateral of $1.25 million.[4]

Cross-petitioner asserts that the bond requirement only affects ATA's "ability * * * to compete" for clients, and that ATA's "inability to compete for business in this arena does not implicate the First Amendment." 99-1829 Pet. 13. This argument is wholly mistaken, for at least two reasons. First, as we showed in the petition in No. 99-1647, ATA's own First Amendment rights are abridged by the Utah Act. See 99-1647 Pet. 9-10. ATA, like many firms in its business, views its consulting activities as a means of advancing certain public policy positions, and it tends to enter into contracts with clients who have a certain ideological orientation. The Court has repeatedly recognized the First Amendment rights of speakers comparable to ATA. See, *e.g.*, *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963);

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[3] At the time of the proceedings in the district court, at least twelve states imposed bond requirements on fund-raising counsel. See C.A. App. 267, 339-46. ("C.A. App." refers to the appendix filed in the district court. In the petition in No. 99-1647, we mistakenly referred to this document as "Dist. Ct. App.")

[4] For this calculation, see C.A. App. 268-70.

Thomas v. Collins, 323 U.S. 516, 531 (1945). Cross-petitioner's suggestion (99-1829 Pet. 6) that what is involved here a "failure to compete" on the part of ATA (which is, in fact, one of the best-known and most highly respected agencies of its kind in the nation) files in the face of this Court's statement that "[f]reedom of speech * * * is available to all, not merely to those who can pay their own way." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

Second, even if cross-petitioner were correct in saying that only the rights of ATA's clients are at stake, she simply ignores this Court's holding in *Meyer v. Grant, supra*, when she asserts that the First Amendment is unaffected by government action that effectively prevents nonprofit organizations from hiring ATA as counsel. In *Meyer*, the Court unanimously struck down a Colorado statute that prohibited proponents of initiatives from paying petition circulators. The state in *Meyer* argued—as cross-petitioner does here—that the restriction did not violate the First Amendment because the proponents had other ways to collect signatures. This Court flatly rejected that argument. See 486 U.S. at 424. This Court stated: "The First Amendment protects [the initiative proponents'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Ibid.* The same principle applies to nonprofit organizations that believe "the most effective means" of "advocat[ing] their cause" is to retain fundraising counsel, and who find their ability to do so impaired by the bond requirement or the other provisions of the Utah Act.

3. Cross-petitioner asserts that the decision of the court below conflicts with the Sixth Circuit's decision in *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F. 3d 1474 (6th Cir. 1995), cert. denied, 517 U.S. 1135 (1996). The Tenth Circuit distinguished *Dayton Area* on the ground that the Sixth Circuit was reviewing the denial of a preliminary

injunction and thus applying a different standard of review from the court below. See 70 F. 3d at 1486. Both the court below and cross-petitioner, however, overlook a more important distinction: the bonding requirement upheld in *Dayton Area* applied to "[p]rofessional solicitors" who were required to post the bond before engaging in solicitation. See *id.* at 1478. Utah seeks to regulate ATA not as a solicitor but as a fundraising consultant that does not engage in solicitation at all.

Nevertheless, cross-petitioner is correct to suggest that the lower courts have struggled with the implications of this Court's decisions in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), *Secretary of State v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984), and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Cross-petitioner notes that *Heritage Publishing Co. v. Fishman*, 634 F. Supp. 1489, 1502 (D. Minn. 1986), upheld a bond requirement that the state of Minnesota imposed on a professional fundraiser. (Again this was a requirement imposed not on consultants but on professional fundraisers "who solicit funds on behalf of charitable organizations within Minnesota" (*id.* at 1493).) But another district court invalidated a bonding requirement that Los Angeles ordinances imposed on professional fundraisers. See *Gospel Missions v. Bennett*, 951 F. Supp. 1429, 1447 (C. D. Cal. 1997). This further demonstrates the need for this Court to review the constitutional issues raised by the Utah Act, even though, for reasons we have stated, the petition in No. 99-1647, rather than the conditional cross-petition, provides the appropriate vehicle.

4. Finally, cross-petitioner suggests that ATA was compensated by its client, Judicial Watch, at an excessively high rate. See 99-1829 Pet. 13. Cross-petitioner does not explain how this discussion is relevant to the question whether the cross-petition should be granted. In any event the

discussion is highly misleading, in several respects. The cross-petition relies on reports from state attorneys general, who, because they are defending regulatory schemes imposed on direct mail fundraising, are interested parties. Perhaps as a result, these reports systematically understate the costs of fundraising, and therefore understate the percentage of net proceeds that the nonprofit organizations receive. See C.A. App. 521-22.[5] In addition, cross-petitioner fails to note that the return to Judicial Watch was not atypical for the first year of direct mail fundraising, when costs must be incurred to build a donor base; in subsequent years, the return to the nonprofit organization increases. Cross-petitioner's misleading and irrelevant portrayal of the relationship between ATA and its client is a further demonstration of what can happen when the government appoints itself the custodian of First Amendment rights, and of why the government should not be allowed to place itself between a speaker and the potential audience, as the Utah Act does in this case.

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[5] In the court of appeals, ATA pointed out some of the misleading and potentially damaging information disseminated by some of the state attorneys general who use registration laws similar to the Utah Act. See Appellant's Brief in Response to Minnesota Brief 3-8.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the conditional cross-petition and then dispose of it as appropriate after plenary review of No. 99-1647.

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No. 99-1829 (3)

IN THE

Supreme Court of the United States

FRANCINE A. GIANI,
Director, Utah Division of Consumer Protection,

Cross-Petitioner,

v.

AMERICAN TARGET ADVERTISING, INC.,

Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, IN SUPPORT OF GRANTING CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was established in 1981 to enable conservative men and women participate in the process of self-government and public policy making. Eagle Forum ELDF is interested in this case both as an entity potentially subject to numerous restrictions on speech and solicitation in its own fundraising activities, and because it believes that the freedom of all private citizens to speak, solicit support, and associate for the advancement and promotion of their core values is a fundamental prerequisite of self-government.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case (on both the Cross-Petition and the primary Petition in No. 99-1647) for several reasons. First, the Cross-Petition raises a split between the Sixth and Tenth Circuits over whether the First Amendment prohibits a State from requiring charitable solicitors to post a substantial bond against the off-chance that they might violate the law in the future. Both the Cross-Petition and the primary Petition also raise issues involving the proper level of scrutiny to be applied to regulations on charitable solicitation. Lower courts interpreting this Court's decision in *Riley* v. *National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), are currently confused over whether strict scrutiny must be applied to such regulations.

Second, the Cross-Petition and the primary Petition raise important issues of constitutional law that have not been, but should be, resolved by this Court. A federal court decision striking down a state law, by its very nature and by constitutional design, raises an important issue. While Eagle Forum ELDF agrees with that portion of the Tenth Circuit's decision invalidating Utah's bond requirement, such a ruling is of sufficient moment that it would benefit from the review and the imprimatur of this Court. The issues raised by the primary Petition also are of great importance insofar as the various burdens and the prior restraint on speech approved by the Tenth Circuit are replicated in numerous other States and localities, and consequently burden, chill, or forbid the core protected speech of hundreds of persons and organizations.

Third, this case presents a favorable opportunity for considering the issues presented concerning charitable solicitations because there are no apparent vehicle problems and the constitutional issues are cleanly presented. This Court should not wait for some uncertain future vehicle because the current confusion, as well as the multiplying state and local laws regulating charitable solicitation, create a cumulative burden

on charities that is significantly and irreparably impinging upon nationwide advocacy and solicitation.

ARGUMENT

While Eagle Forum ELDF believes that, on the merits, the Tenth Circuit was correct in striking down Utah's bond requirement and, indeed, should have struck down the other challenged provisions as well, it also believes that the degree of confusion and the existence of different standards in different jurisdictions make it imperative for this Court to establish some uniformity in this area. Eagle Forum ELDF therefore supports granting *both* the Cross-Petition and the primary Petition for certiorari in No. 99-1647.

I. This Case Creates a Conflict between Federal Courts of Appeals and Partakes of the Confusion Among Lower Courts over the Proper Degree of Scrutiny.

As Cross-Petitioner correctly points out, Cross-Pet. 15-17, there is a circuit split over whether a bonding requirement is permissible. *Compare American Target Advertising, Inc.* v. *Giani,* 199 F.3d 1241, 1250 (CA10 2000) (holding that "the bond/letter of credit provision of the Utah Act is unconstitutional on its face") *with Dayton Area Visually Impaired Persons, Inc.* v. *Fisher*, 70 F.3d 1474, 1486 (CA6 1995) (upholding Ohio's "$25,000 bonding requirement on professional solicitors"), *cert. denied*, 517 U.S. 1135 (1996).[2] The

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[2] The Tenth Circuit mistakenly viewed the Sixth Circuit's *Dayton* decision as involving only limited abuse-of-discretion review in the context of a preliminary injunction. *American Target Advertising*, 199 F.3d at 1249. Regarding those portions of the Ohio law that the district court enjoined, review was limited to the likelihood of success. But as to those portions of the Ohio statute sustained by the district court, the Sixth Circuit reviewed *and affirmed* the district court's dismissal of plaintiffs' claims against those provisions. *See* 70 F.3d at 1479-80 (district court "granted in part the defendants' motion to dismiss the claims brought by the plaintiffs"; finding jurisdiction "over all aspects of the plaintiffs' appeal"); *id.*

opportunity to resolve this conflict over the validity of essentially identical state laws is a compelling reason to grant the Cross-Petition and, by necessity, the primary Petition.

In addition, both the Cross-Petition and the Petition present this Court with the embedded question of what level of scrutiny to apply to regulations on charitable solicitation. Lower courts addressing this issue since *Riley* have been confused over whether to apply strict or intermediate scrutiny. Thus, in this case the Tenth Circuit held that the Utah Act, which applies only to "charitable" solicitations, "is content neutral, and we accordingly subject it to intermediate scrutiny." 199 F.3d at 1247. By contrast, the First Circuit in *Auburn Police Union* v. *Carpenter*, 8 F.3d 886, 893 (CA1 1993), *cert. denied,* 511 U.S. 1069 (1994), cited *Riley* and applied strict scrutiny to a state law that "applies to, and prohibits, only certain types of solicitation, necessitating an examination of the content of each solicitation in order to determine whether the Act's criteria are implicated." The First Circuit distinguished the law it was reviewing from a content-neutral restriction that applied to all solicitations, "whether commercial or charitable." *Id.*; *see also Special Programs, Inc.* v. *Courter*, 923 F. Supp. 851, 854 (E.D. Va. 1996) ("Nonetheless, the government may regulate charitable solicitations if such regulation is narrowly tailored to serve a compelling state interest; that is, the regulation meets strict scrutiny.")

Determining the level of scrutiny is the fundamental first step to virtually any challenge to regulations on charitable solicitation, and therefore confusion on this issue has wide-ranging effects. Resolving such confusion in this case will thus enhance uniformity and coherence in future cases involving a diversity of regulations and fact patterns.

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at 1490 (affirming the judgment of the district court). The Sixth Circuit's ruling affirming the dismissal of that portion of the complaint relating to the bonding requirement thus represents a full determination on the merits and squarely conflicts with the Tenth Circuit's ruling in this case.

II. This Case Presents Important Issues that Should Be Resolved by this Court.

Not only is this case important due to the conflict and confusion in the lower courts, but several of the issues presented by this case are themselves of sufficient substantive importance to warrant review by this Court. First, as presented by the Cross-Petition, the Tenth Circuit struck down a provision of state law requiring a $25,000 bond from entities engaged in charitable solicitation. Although Eagle Forum ELDF believes that decision was correct, it readily acknowledges that a federal court striking down a state law is a matter of substantial importance.

Second, the questions presented by both the Petition and the Cross-Petition affect the primary conduct of numerous persons, organizations, and governmental entities. Regarding the bonding requirement struck down by the Tenth Circuit, the decision below effectively invalidates any such requirements or potential requirements throughout all other jurisdictions in the Tenth Circuit, and casts doubt on such requirements everywhere else in the country except for the Sixth Circuit. The existence of comparable requirements in other jurisdictions has long been an important factor favoring a grant of certiorari. *See New York* v. *Ferber*, 458 U.S. 747, 749 (1982) (certiorari granted where Federal Government and 47 States had similar statutes to the one held unconstitutional); *New York* v. *O'Neill*, 359 U.S. 1, 3 (1959) (certiorari granted in case striking down state statute "inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico"); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 221 (1957) (granting certiorari where the issue was important "not only to California but to other States which have similar laws").

Regarding the registration, licensing, and fee provisions upheld by the Tenth Circuit, the decision below will alter the

behavior and impose a burden on the speech of many hundreds of charities, solicitors, and consultants throughout the entire nation. Indeed, the law is sweeping in its coverage, requiring extensive information not only about the soliciting entities or advisors, but also about each individual solicitation conducted. *See* Utah Code Ann. §§ 13-22-6(1)(b)(v)-(viii), 13-22-9(1)(b)(vii)-(viii), Cross-Pet. App. 62-63, 68-70. Furthermore, the law's definition of charitable solicitation includes a truly staggering amount of protected speech. Thus, a "charitable solicitation" means "any request, *directly or indirectly*, for money, credit, property, financial assistance, or *any other thing of value* on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made *in any manner*, including: ... any oral or written request ... [or] the distribution, circulation, or posting of any handbill, written advertisement, or publication ...." § 13-22-2(b)(3), Cross-Pet. App. 53 (emphasis added). This definition seemingly encompasses all manner of communication – arguably including contribution forms in newsletters, e-mails, and web-site links[3] – seeking anything from money to *pro bono* professional services or other contributions of time, to miscellaneous contributions such as canned foods, clothing, medical supplies, or the like. When the remarkable apparent breadth of this law is combined with the nationwide scope of many charitable solicitations, the Utah Act can be seen to burden a vast amount of charitable solicitation by persons and groups all over the country.

Third, the cumulative impact of the Utah law and its analogues in other jurisdictions impose a tremendous burden on speech. When evaluating the importance of the issues in this case, the Court should consider not just Utah's Act in isola-

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[3] Indeed, the State of Utah has threatened to apply the Utah Charitable Solicitations Act to Eagle Forum based exclusively on Eagle Forum's web site, which contains a page allowing visitors to make contributions. *See* www.eagleforum.org/order/donate.html (June 15, 2000).

tion, but rather the synergistic impact of that law in combination with comparable laws that are or could be adopted in every other State and locality. *Cf. Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (Commerce Clause implications of a statute must be evaluated by considering "what effect would arise if not one, but many or every, State adopted similar legislation"). Thus, while each individual fee of several hundred dollars may not alone seem onerous, when multiplied by the potential 50 States and countless localities regulating solicitation, the fees for a charity can become prohibitive. Furthermore, the requirements of each jurisdiction, although similar, are not identical, and thus create a trap for the unwary who miss one or another small detail required by one jurisdiction but not others. The multiplicity of regulations thus imposes a tremendous compliance cost – including legal fees – in order to avoid violations by inadvertence. Finally, because the Utah Act and its analogues have provisions making violation of one act potential grounds for denial of a license under another act, *see* §§ 13-22-9(1)(b)(xi), 13-22-12(1)(b)(ii), Cross-Pet. App. 71, 76, the effects of even an inadvertent error in one jurisdiction can bar solicitation throughout the nation.

III. This Case Is an Appropriate Vehicle, and Waiting for an Uncertain Future Vehicle Would Impose a Significant, Ongoing, and Irreparable Burden.

Neither party to this case has offered any objection to the appropriateness of this case for Supreme Court review. Rather, each side has merely reiterated that it believes itself to be correct on the merits. There are no apparent jurisdictional problems with the case and no intervening issues that would preclude reaching the constitutional questions raised.

Awaiting a possible alternative vehicle to address the issues presented here is undesirable given the irreparable injuries that will occur in the interim. In the preliminary injunction context, for example, it is axiomatic that violations of First Amendment rights constitute irreparable injury. *See El-*

rod v. *Burns*, 427 U.S. 347, 373 (1976). The same concerns favor granting certiorari in this case rather than waiting. Regarding the bonding requirement, although the Tenth Circuit correctly struck down that provision, charitable solicitors in the Sixth Circuit and elsewhere are having their First Amendment rights infringed, and may well be chilled from soliciting at all in certain jurisdictions until this Court settles the matter on a national level. And regarding the various other requirements of the Utah Act and its counterparts elsewhere, the burden on speech will be continuous, widespread, and irreparable until this Court rules on such requirements.

CONCLUSION

For the foregoing reasons, this Court should grant the Cross-Petition and the primary Petition (No. 99-1647) for certiorari.

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